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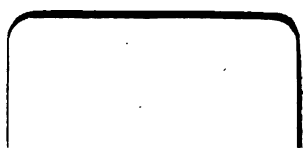
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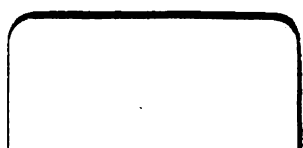
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CASES
ARGUED AND DETERMINED
IN THE
HOUSE OF LORDS;

DURING THE YEARS 1850 AND 1851.

[Before LORD CHANCELLOR COTTENHAM, LORD BROUGHAM, and LORD CAMPBELL.]

BAKER, Appellant, TUCKER, Respondent.¹

March 6, 8, and 12, 1849; and July 9, 1850.

Will, Construction of — "In Default of Issue" — Referential Construction.

A testator, in the year 1821, devised his real estates to his illegitimate son, J. B., for life, "and from and after the decease of the said J. B., for and to the first and every other son of the said J. B., lawfully issuing, according to seniority of age and priority of birth, in tail male; and in default of such issue, to the daughter or daughters of the said J. B., to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants; and in default of issue of the said J. B., to and for my own right heirs forever:—

Held, that J. B. took an estate for life only under the will.

Although an old decision, which has been long followed as having settled the law, may be shown to have proceeded upon a wrong view of what the case was, it cannot be disregarded.

Blackburn v. Edgley, 1 P. Wms. 600, examined and followed.

THIS was an appeal from the court of chancery in Ireland. The question arose upon the construction of the will of Henry Baker, of the "Farm," in the county of Kilkenny, and dated the 26th April, 1821. The testator, after devising all his estates, both real and personal, to a trustee therein named, to hold to him, his heirs, executors, administrators, and assigns, upon certain trusts, for the payment of debts, legacies, and annuities therein mentioned, proceeded as follows: "And fourthly, subject to the above-mentioned charges for debts, legacies, and annuities hereby charged upon the same, I declare that the above devise of all my several properties in lands is in trust for, and I hereby devise the same to, my above-mentioned reputed son, John Baker, for and during the term of his natural life;

¹ 14 Jur. 771.

Baker, Appellant, Tucker, Respondent.

and from and after the decease of the said John Baker, for and to the first and every other son of the said John Baker lawfully issuing, according to seniority of age and priority of birth, *in tail male*; and in default of such issue, to the daughter or daughters of the said John, to hold to them, if more than one, *and their heirs*, as tenants in common, and not as joint tenants; *and in default of issue of the said John Baker, to and for my own right heirs forever.*" The testator died in the month of May, 1822, leaving the said John Baker and four other putative children him surviving. In October, 1825, John Baker married, and upon that occasion executed a settlement, but which it is unnecessary to refer to. There was no issue of the marriage, and in the month of February, 1844, John Baker executed a disentailing deed for the purpose of barring the remainders over, assuming therein, that under the will of the testator he was tenant in tail general, after the limitation to his daughters and their heirs. On the 9th March, 1844, John Baker made his will of that date, and devised all his freehold property, and all other property of which he might die possessed, to his wife, Sophia Baker, forever. John Baker died in the month of December, 1845, without having had any issue, and upon his death his widow, Sophia Baker, entered into possession of the estates. Martin Tucker, as the heir-at-law of the testator, Henry Baker, filed his bill against Sophia Baker and another, praying that the will of the testator, Henry Baker, might be established, and the trusts performed, &c., and that it might be declared that he was entitled to an estate in fee simple in the lands and premises, upon the true construction of the said will. Sophia Baker, by her answer, claimed to be entitled to the fee and inheritance of the lands devised by the will of Henry Baker, under and by virtue of the disentailing deed and the will of John Baker. The cause was heard before the lord chancellor of Ireland, on the 29th and 30th January, and the 3d February, 1847; and on the 25th February, 1847, his lordship gave judgment in favor of the plaintiff, the present respondent, on the ground that John Baker took an estate for life only under the will of Henry Baker.* From that decree Sophia Baker now appealed.

* The following is the very able and learned judgment pronounced on that occasion:—

"In this case the question for the decision of the court arises upon the will of Henry Baker. The testator, by his will, bearing date the 26th April, 1821, after disposing of his personal property, devised his real estates in the following manner: [His lordship here stated the limitations of the will.] The devise to John Baker is to a natural son; and it is quite plain, from the context and phraseology of the will, that the testator was perfectly well aware of the results that followed from the position of the devisee, and that neither John Baker himself, nor any of his issue, could ever take as right heir to Henry, the testator. The plaintiff in this cause is the heir-at-law of the testator, being the son of his only sister, and he now claims, as on a failure of the limitations to John and his issue, John never having had any children. The defendant, Sophia Baker, the widow and devisee of John Baker, claims under him, alleging that he took an estate tail, not directly displacing the limitations to his sons and daughters, but by way of remainder on failure of the prior limitations; and that to effect this object, the estate in fee given to the daughters must be cut down to an estate in tail general, so as to effect a vested limitation of the remainder. The defendant contends for this construction on the grounds of the general intention manifested, as she insists,

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Humphry and *Prior*, in support of the appeal. If this will ended at the limitation to the daughter or daughters of John, there could be no doubt but that they would take a fee as tenants in common; but the word "heirs" must be construed according to the meaning of the testator; and there are numerous authorities for cutting down the

in the will, to provide for the issue of John Baker; and that, if this intention is to prevail, the estate must pass through the entire line of the issue of John before it could go back to the testator's own right heirs; that the express limitations do not affect that object; that their effect is, in certain events, to defeat the ultimate remainder; and that, to remedy these defects, the construction contended for by her must be adopted. If the construction contended for by the defendant prevail, there is no doubt it will remove a great many difficulties which must otherwise arise; for it is quite true, that if I arrive at the conclusion that the intention of the testator was as stated, yet, if the will cannot be construed as contended for by the defendant, the consequences would follow which have been noticed by her counsel in argument. Thus, if there were no daughters, a daughter of a son of John Baker could not take in any event. Again, if John Baker married twice, and had a son by the first marriage, who should die leaving daughters, and a daughter by the second, who should die without issue, the daughters of the son of the first marriage could not take, because they would be only of the half blood to the daughter of John; and in case of failure of the estate in tail male to John's sons, and a daughter taking the estate and dying without issue, the estate would not go to the right heirs of the testator, but would escheat to the crown; or, if a trust estate, would vest in the trustee for his own benefit according to the rule, established in the case of *Burgess v. Wheat*, 1 H. Bl. 123. The construction contended for by the defendant's counsel will remove all these difficulties, if it can prevail. We may, I think, safely assume that, in some event or other, the testator meant that the estate should go back to his right heirs, and that he meant to accomplish this object by the limitations of the will. It is true that the devise to the right heirs is void as a devise, or rather, was so when this will was made; but the case cited by Mr. Fitzgerald, *Nottingham v. Jennings*, 1 P. Wms. 23, shows that such a devise as was stated in that case may be sufficient to manifest the intention of the testator, and aid the construction of the will. It is also, I think, plain on the face of the will that the testator knew what every man must be presumed to know, that, by law, none of the descendants of John Baker could take under this devise to the right heirs: there is nothing, at all events, on the face of the will to show that he was under any mistake upon that subject. The question, then, is, What is the effect upon this will of the devise, on failure of issue of John Baker? It is not a devise on failure of issue of the daughters of John Baker, which would have cut down the estate given to them to an estate tail, as is clearly stated by Holt, C. J., in that case of *Nottingham v. Jennings*, already mentioned, and as is ruled in many cases. This is a question of intention; and to take the most simple case of a devise to A., and in default of his issue to B., it has long been settled that the devise, which would *prima facie* have given but an estate for life to A., gives him an estate tail to effectuate the intent deduced from the words of limitation over, that all his issue should take the estate before it could go to the devisees in remainder. The next class of cases opens another question: it is, when, after the devise to the first taker, either generally or expressly, for life, particular limitations are introduced in favor of his issue, followed by a limitation on failure of issue of the same person. If these particular limitations exhaust the entire line of issue in whose favor they are designed, without calling in any implication of a more general character to be deduced from the language of the limitations over, that limitation is to be considered as implying nothing more than has been expressed by the particular limitations which precede it, because the intention which it indicates has been already expressly and fully carried out. This is the case of *Bamfield v. Popham*, Bolk. 236, referred to in *The Attorney General v. Sutton*, 1 P. Wms. 760, and *Ginger v. White*, Willes, 348. But the ignorance and inaccuracies of testators too often present to the consideration of courts of justice cases requiring the application of a different principle, and numerous have been the instances in which they have been called on to determine on the effect of such general words of limitation in remainder, when the provisions already expressed do not appear to be consonant with

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word "heirs" to mean heirs of the body; and where, as in this case, there is a gift over, but in default of issue of another person who took under a previous limitation, and who is the parent of the subsequent taker, and a failure of whose issue involves the failure of the issue of the subsequent taker, (the daughters,) the word "heirs" will be read

the presumed intention; and hence has arisen the rule, that the particular intent is to be disregarded, in order to carry into effect the manifest general intent of the testator. This principle has been applied to one division of this class of cases more immediately applicable to the present case — that is, where, in the enumeration of the lines of issue, the entire number of the same class, which the particular limitations indicate an intention of selecting, is left incomplete, there the general language of the limitation over has been laid hold of as indicating the general intention to include all of the class, and as controlling the particular limitations to a particular number. Such is the case of *Langley v. Baldwin*, 1 Eq. Ab. 185, where the devise was to J. S. for life, and after his death to his first son in tail, and so on to the sixth son; and then devised, that, if J. S. should die without issue male, the land should remain to J. B.; and the court of common pleas certified that J. S. took an estate tail. And Raymond, C. J., observes, on this case, that an estate tail was raised by implication, because the express devise was not to all the sons; for if there had been more than six, and the six dead, must the heir-at-law have it before a seventh son? So also in *The Attorney General v. Sutton*, 1 P. Wms. 753; 3 Bro. P. C. 75, Toml. ed., the devise was to the testator's nephew (who was not his heir-at-law) for life, and afterwards to the first son or issue male of his body, and to the heirs male of the body of such first son; remainder to his nephew's second son, and his issue male in tail; and then, after the death of the nephew without issue male of his body, the estate was limited over: and in this case, too, it was held by the House of Lords that the nephew took an estate tail. Again, in the case of *Stanley v. Lennard*, Amb. 355; s. c. 1 Eden, 87, in a devise to Samuel, the natural son of the testator, for life, and after his death to his eldest son and his issue male, and, for want of issue of Samuel, then over, it was held that Samuel took an estate tail in remainder. Now, in these cases the intent of the testator was manifest to make provision for all the issue of the persons to whom express estates for life were given, but the enumeration did not comprehend the entire class; and the court laid hold of the language of the event on which the limitation over was to arise, so as to include the whole line. But that is not the case in the will that is now before me. Here the lines of issue are defined; within the range of the intention, as it is indicated by the particular limitations, the devises are complete. All the sons of John Baker, with all the male descendants of these sons, are included in the first limitation; all his daughters and their descendants are included in the second. I am now considering the case as if the devise to the daughters was what the defendant contends it should be — that is, conferring on them an estate tail. Now, referring to the authorities, it cannot be denied, that in this division of the general class of cases, in which the supposed general intent, deducible from the limitations over, is apparently more comprehensive than the particular antecedent limitations would satisfy, but in which complete provision is made for all the members of the particular lines of issue which those antecedent limitations of themselves indicate an intention to provide for, the enlarged construction has not been given which has been applied to the class I have previously noticed. It has been considered, that, instead of applying the general words of the limitations over to enlarge the provisions of the particular limitations, and supply their defect, the latter are, in this second class, to contract the more general language of the limitation over, and confine it to the lines of issue for whom express provision has been made; that, in using general language, the testator is not of necessity to be supposed as intending to do more by implication than he had actually done by the express words he had used; and that the express limitations being sufficient to include all the class of which express mention is made, they do not of themselves supply any ground for supposing the intention to have been more extensive; and that, in the absence of any such evidence of intention to be deduced from those limitations, there is no foundation for giving a more enlarged meaning to the words of the limitation over. In other words, in both classes of cases the intention is deduced, not from the words of the limitation over, but from those of the prior limitation;

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"heirs of the body," because it is impossible to construe the gift over without adopting that construction. The gift over in the present case is only in the event of a general failure of issue of John Baker. Late cases have tended to sacrifice the particular to the general intent. *Jesson v. Wright*, 2 Bligh, 1. What we contend should be

in the one case, from their imperfection to accomplish what they show to have been the particular intent; in the other, from their being adequate and sufficient for that purpose. The earliest case on this head is that of *Turk v. Frencham*, 2 Dy. 171; s. c. *Anders*. 8. In this case, the devise was to Clement Frencham, and the heirs male of his body; and if it happen that he dies without issue of his body, then over to Alexander Frencham; and it was held, that Clement Frencham took but an estate in tail male, which was not enlarged into an estate in tail general by the words of the limitation over; 'but the first words in the will is the intent of the testator, which guide the subsequent words;' and upon this principle proceeded the case so much relied on at the bar—I mean the case of *Blackborn v. Edgley*, 1 P. Wms. 600. There was a case which very strongly resembled the present. There the testator devised his estate in trust to convey them to Hewer Edgley for life, without waste, remainder to trustees to preserve contingent remainders, remainder to his (Hewer's) first and other sons in tail male, remainder to his daughters in tail general, as tenants in common, with a jointuring power to Hewer Edgley; and if Hewer Edgley should die without issue, then the testator devised the estates over in fee to his cousins. Now, in that case, as in the case now before me, an argument was raised upon the effect of the terms of the limitation over; and it appears to me, that the court there collected the intention of the testator, not from the language of the limitation over, but from the words of the antecedent limitations; and, there being no manifestation of an intention in the testator to comprehend every class of Hewer Edgley's descendants, the court did not put a larger construction on the prior limitation than the words themselves necessarily imported. There, too, as here, it was argued, that, unless an estate tail was given to the first taker, his son's daughters would be excluded. But Lord Chancellor Parker said, 'As to what had been urged, that unless these words were to create an estate tail in Hewer Edgley, his son's daughters could not take, it did not appear the testator intended Hewer Edgley's son's daughters should take, for he might think, that on Hewer Edgley dying without issue male his name and family would be determined; for which reason he might limit it over to the daughters of Hewer Edgley himself. Besides, the son of Hewer Edgley would be tenant in tail, and when of age might, by docking the entail, give the premises to his daughters.' The case of *Morse v. The Marquis of Ormond*, 5 Mad. 99; s. c. 1 Russ. 382, has also been cited to the same effect; it does not, however, touch the principle so closely as *Blackborn v. Edgley*, because in *Morse v. The Marquis of Ormond* there were much stronger grounds for contending that the failure of issue there meant the issue before provided for, than in the case of *Blackborn v. Edgley*. In the report of the case of *Morse v. The Marquis of Ormond*, 1 Russ. 382, much stress is laid on the words of the codicil. I may also here refer to the case of *Graves v. Hicks*, 5 Ad. & El. 38; s. c. 11 Sim. 536, cited in argument. That case is in affirmance of the principle of construction I have stated, and in accordance with the case of *Blackborn v. Edgley*. In that case, the devise was to the testator's grandson for life, with remainder to trustees to preserve contingent remainders; remainder to his first and every other son in tail male; and, on failure of such issue, remainder over. By a codicil, he revoked several dispositions, and devised the estate to his grandson and his heirs in strict entail, as in his will directed, and on failure of issue of the grandson, then over. The court of queen's bench held, that the grandson took a life estate only, and the vice-chancellor concurred in their decision. So far the cases maintain the general proposition I have already referred to, namely, that the testator is not to be supposed to intend to do more by implication than he has done by express words. If it were the intention of the testator that the daughters of the sons should take estates, he might have secured that object by an express limitation, as readily and as naturally as he did the express limitation to the sons of sons. The case of the defendant, however, is not pressed to the extent of seeking to destroy the intermediate limitations; but it is contended for her, that the general intention of the testator will be satisfied by giving an estate tail to John Baker, after the limitations to the daugh-

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implied here is, an estate tail to John Baker in remainder, after the estate tail to his daughters; this would leave untouched all the particular limitations, only construing "heirs of the daughters," heirs of the bodies of the daughters.

The general intent of the testator was to provide for all the members of John Baker's family; and the construction for which we contend would effect this object. The contrary construction would defeat this object, for at the time this will was made there could be no inheritance of the half-blood; and if a daughter of a second marriage took the fee, the effect might have been this: that, though there might be numerous daughters of sons by the first marriage, the estate would go away from the family. So that not only would the general intent, that the estate was not to go over except upon the failure of issue of John Baker, be disappointed, but the right heirs of the testator would be disappointed by giving an estate in fee to the daughters, for this would carry it to their maternal heirs, or to the crown. The case of *Blackborn v. Edgley*, 1 P. Wms. 600, which was the case nearest the present, and which, by the lord chancellor of Ireland, was considered as concluding the question in the present case against the appellant, is not an authority to be followed; because, first, the will in that case is not correctly stated. We have examined the Reg. Lib., and find that the devise after that to Hewer Edgley for life, &c., instead of being, as reported in Peere Williams, to sons in *tail male*, remainder to daughters in *tail general*, was to

ters. The case of *Doe v. Gallini*, 3 Ad. & El. 340, has been relied on by her counsel for this proposition, and on it they have mainly rested her claim. That was the case of a very complicated will; and it is quite manifest that the court collected the general intention of the testator, not from the simple words in default of issue, but from all the particular limitations. In examining that case, it will be apparent that the intention of the testator was, that the estate should not go over as long as there was any stock of the testator, and that all his issue should be included in the limitations. [His lordship here read the limitations at length.] These evidence a full intention that every line of the issue of the testator should take. The particular limitations, it will be observed, were, to a certain extent, imperfect, not providing for the children of children who might have died in the lifetime of particular issue; but the intent was manifest to provide for every line of issue, and brings the case within the range of *The Attorney General v. Sutton*, and the cases of that class to which I have already alluded, where, the particular limitation being incomplete, the language of the limitation over was laid hold of as indicating the general intent; and that, in truth, is the principle of the decision in the case of *Doe v. Halley*, 8 T. R. 5, also relied on so strongly by the defendant. That case, however, is not an authority for the proposition contended for by the defendant. It is a case of plain intention to include all the male issue of Michael Halley; and it never could be contended, that the testator meditated, by 'issue,' only the eldest son and his heirs. That case stands on its own circumstances, and is no authority to cut down the estate in fee of the daughters in the present case. Upon the whole of this case, whatever doubt or difficulty I might feel if the question was an open one, I am bound to say I think it is concluded by the authority of the case of *Blackborn v. Edgley*. That case was decided more than a century since, and has never been overruled. I cannot, therefore, now disregard it; on the contrary, till a court of law shall overrule it, I feel myself bound to follow the decision. I shall therefore hold that John Baker took but an estate for life, and that the defendant, Sophia Baker, can derive no interest in the lands as his devisee; at the same time, if she desire to have the opinion of a court of law upon the will, I shall direct a case for that purpose."

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heirs male of bodies of sons, and heirs of bodies of daughters; and the report is in other respects inaccurate, as appears from extracts from Reg. Lib., A. D. 1719, fol. 445, *et seq.*¹ And it appears from the decree, that Susanna, one of the donees over, had died, and that Hewer Edgley was her heir; and one question was, whether it was a vested interest in her so as to descend to her heir, or vested by purchase; and it is clear that the decree could not have proceeded upon the referential construction; for the terms of the decree show that the court had in its mind, as the ground of the judgment, the actual words of the preceding devise. But assuming that *Blackborn v. Edgley* is in authority, we submit that it does not decide any general rule which can govern this case; and all the decisions which have followed that case, by giving a referential construction to the words "without issue," have been decided upon their special circumstances. This was particularly the case in *Morse v. Lord Ormond*, 5 Mad. 99; and on appeal, 1 Russ. 382. So in *Graves v. Hicks*, 5 Ad. & El. 38; 11 Sim. 536. *Blackborn v. Edgley* has never been received by conveyancers as establishing the proposition of the other side; it is not referred to by Mr. Fearne, or Mr. Preston, nor in Powell on Devises,

¹ The following were the extracts referred to:—

"And in case the said Hewer Edgley should die without issue behind him, or if such issue should happen to die without issue of their respective bodies, then his will was, that his said real estate, and the estate to be purchased with his personal estate, should be so settled, that in case his kinswoman, Ann Edgley, should be then living, she should enjoy the rents of his whole estate for her life, and from her decease one-fourth part thereof was to be enjoyed by the plaintiff William Blackborn, his heirs and assigns; one other fourth, by the plaintiff Abraham Blackborn, his heirs and assigns; another fourth by the plaintiff Ann Jackson, her heirs and assigns; and the other fourth by Susanna Edgley the younger, daughter of the said Ann Edgley, her heirs and assigns."

Prayer of bill, *inter alia*, to account for personal estates and rents, "and settle and convey the manors and lands the said testator died seized of, according to the directions of his will." Annuities secured, and charged on estate, &c.; personal estate appropriated, debts and legacies paid, and residue of personal estate laid out in lands, to be settled accordingly, as directed by will; and to have directions of the court touching the testator's will and the matters aforesaid."

Decree, *inter alia*. "And that, if any other matters shall seem difficult, the said master do report the same specially to the court for further directions thereon; and what, upon account, &c., the residue shall appear to amount unto, is to be laid out and invested in one or more purchase of land, by and with the approbation of the said master; and when such purchase shall be made, it further ordered and directed, that the lands so purchased, or a sufficient part thereof, be charged and made liable to the payment of the said charity of 6*l.* a year to the schoolmaster of Clapham, and his successors forever, according to the direction of the said will, and that the said master do see the same done accordingly; and, subject thereto, that the lands so purchased, and also the testator's real estate, be settled according to the testator's will; and in case the parties differ about such settlement, the said master is to see the same made, pursuant to the said will. But in regard to the said Susanna Edgley, who is dead, his lordship declared, that the fourth part of the estate in question, which was to have been limited to her in case of Hewer Edgley not having sons and daughters living at his death, ought to go to the said Hewer Edgley, her brother and heir, and to his heirs; but, before such settlement is to be made, proper care is to be taken to indemnify the trustees against any demand from the crown, and the parties are to be at liberty to apply to the court in relation thereto, as occasion may require. . . . And it is further ordered, that all parties, plaintiffs, and defendants in these causes have their costs of these suits, to be paid out of the trust estate."

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nor in Hargrave & Butler's Coke Littleton, nor in Roberts on Wills, nor in Burton's Compendium of Real Property. The lord chancellor of Ireland fell into an error in this case, when referring to the case of *Turk v. Frencham*; 2 Dy. 171, from which he infers that "the first words in the will is the intent of the testator, which guide the subsequent words." The English translation of Dyer says, "For the intent of the deviser appears expressly by his subsequent words;" but this is a mistake; and upon principle there can be no doubt that the last words in a will, and the first in a deed, must prevail. *Morrall v. Sutton*, 1 Ph. 533. And in *King v. Melting*, Vent. 225, Hale, C. J., explains the case in Dyer, in this manner, p. 231: "For an implication of an estate of inheritance shall never ride over an express limitation of an inheritance before;" and, in the present case, we do not ask to imply an estate which will override the previous estates, but only to imply an estate tail in remainder in John Baker. The rule in *Shelley's Case* is not confined to immediate limitations after the estate for life. *Lewis v. Waters*, 6 East, 336; 2 Jarm. on Wills, 371; *Parr v. Swindels*, 4 Russ. 283. After commenting at great length on the further cases of *Cole v. Sewell*, 12 Jur. 927; *Bamfield v. Popham*, 1 P. Wms. 54; *Allanson v. Clitherow*, 1 Ves. 24; *Doe v. Gallini*, 3 Ad. & El. 340; *Goodright v. Dunham*, Dougl. 264; *Ginger v. White*, Willes, 348; *Bristow v. Boothby*, 2 Sim. & S. 465; *Edwards v. Alliston*, 4 Russ. 78; *Tenny v. Agar*, 12 East, 253; *Nottingham v. Jennings*, 1 P. Wms. 23; *Scott v. Scott*, Amb. 383; *Doe v. Halley*, 8 T. R. 5; *The Attorney General v. Sutton*, 1 P. Wms. 753; *Stanley v. Lennard*, 1 Eden, 87; *Langston v. Langston*, 8 Bligh, N. S. 167; *Ellicombe v. Gompertz*, 3 My. & C. 150; and *Franks v. Price*, 3 Beav. 182, they referred to the conclusions deduced from the authorities by Mr. Jarman in his Treatise on Wills, vol. 2, c. 40, s. 3, p. 397, and contended that Mr. Jarman's second proposition, namely, that the words "in default of issue," or expressions of a similar import, following a devise to *all* the sons successively in tail male, and daughters concurrently in tail general, are to be construed as signifying "such issue," even in the case of an executory trust, was not only not deducible from the authorities, but contrary to them, referring to the Supplement to Fearn's Cont. Rem., by J. W. Smith, p. 296; and they suggested, that, instead of Mr. Jarman's second proposition, the following should be adopted as the only rule deducible on this point from the authorities: That whenever the prior limitations are to *all* the children in fee, leaving, therefore, nothing to be disposed of if they take effect; or in tail, so as effectually to dispose of the estates under every state of circumstance antecedent to that designated by the primary meaning and ordinary interpretation of the words of the gift over, (independently of events happening prior to the testator's decease, which, it is supposed, he can himself provide for,) these words would be held properly, almost indeed of necessity, *referential only*; but in every case where any chasm of events occurs between the actual limitations to the children, and that upon which the gift over is made to depend, (not referable in point of time to the life of the testator,) an estate tail in remainder in the parent, tenant for life,

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whose issue is referred to in the gift over, would be implied to fill up such chasm. That such seems to have been the true principle upon which the cases, (with the exception of *Blackborn v. Edgley*, if that case be not referable to special circumstances,) and particularly the later ones of *Doe v. Halley*, *Doe v. Gallini*, and *Parr v. Swindels*, (ubi sup.,) proceeded; and that it was much better that the rule, and its application, should depend upon whether or not the prior dispositions thus comprehend in their range all the objects which the gift over contemplates as having failed — a plain and simple fact — than that it should depend upon so varying and unsatisfactory a state of circumstances as their comprehending such objects to some greater or less extent; and that, if a restrictive intention can be collected from the whole of the will, a restrictive interpretation will be applied accordingly, as in *Ellicombe v. Gompertz*. But that if there be nothing from which it can be properly inferred, the words of the gift over, which seem then to be the proper and legitimate source for implication, would be left to their primary and legal import and operation — thus effecting the general intention of the testator, and without involving the sacrifice of any particular intention, or the departure from any acknowledged rules or principles of construction. Lastly, they contended, that even assuming that the daughters of John Baker were intended to take in fee, still that a concurrent contingent remainder to John Baker might be implied in this way, “and if no daughters, then to John Baker in tail;” this would have enabled John Baker to bar the remainders, under the Irish fines and recoveries act, 4 & 6 Will. 4, c. 92, s. 12-16, 22.

G. Turner and *Wickens*, for the respondents. The question here turns merely upon the construction of this will; that is, whether an estate tail in remainder in John Baker is to be implied. The other side contend, that, although there is an express devise to John Baker for life, followed by limitations to the male issue of John Baker, and then to the daughters in fee, yet that the estate in fee to the daughters is to be cut down to an estate tail, and that then a limitation in tail in remainder to John Baker is to be interposed before the gift to the right heirs of John Baker. There are four constructions of this will which may be contended for: first, that of the appellant; secondly, that these words, “and in default of issue of the said John Baker,” are clearly referential words, referring to the issue of John Baker, who had been described in the previous limitations; thirdly, that these words may be construed, “in case there shall be no issue of John Baker,” in which case there would be a contingency with a double aspect; fourthly, that the daughters of John Baker were to take in fee, and that there is nothing in the will to cut down the construction of this express limitation to an estate tail. The first and second of these propositions must be considered together. The proposition of the other side is, that in all cases where there is a limitation in default of issue, if there be any chasm in the prior limitations, you must imply an estate tail in remainder. The effect of this rule would be, that, notwithstanding a testator expresses peculiar favor for particular

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lines of issue, the words "in default of issue" must be construed as words of limitation, and not referential. Suppose a limitation to A for life, remainder to the eldest son of A in tail female, remainder to the second son in tail male, and in default of issue of A, then over,—this rule would oblige you to insert an express limitation, so as to carry the estate to the tail male of A. In the present case, there is no failure in the limitations to the immediate children of John Baker; the omission is only as to daughters of the sons of John Baker. We admit, that where a testator limits an estate to A for life, and then to several sons of A in tail, and then there is a general limitation over, in default of issue of A, the courts have considered that the limitation was not in favor of any particular son, and have therefore implied an estate tail in the parent; but the cases have not gone so far as to imply this in favor of remote issue, but only to let in a class equally near to the first taker; the chasm has only been supplied in favor of the immediate generation. *Langley v. Baldwin*, 1 Eq. Ab. 185, pl. 29; *The Attorney General v. Sutton*, ubi sup. *Doe v. Halley*, ubi sup. *Stanley v. Lennard*, 1 Eden, 87. The other side say that Dyer's report of *Turk v. Frencham* differs from Anderson's; but we submit that the latter is most correct, for there was nothing in the subsequent devise which could regulate or guide the court; therefore the observation in Dyer about "subsequent words" cannot be correct. The case of *Blackborn v. Edgley*, ubi sup., must decide this case; and your lordships cannot decide in favor of the appellant without overruling that case, which has been followed for more than one hundred years. It was followed in *Morse v. Lord Ormond*, ubi sup., and that case was not decided on its special circumstances, as was contended on the other side; the lord chancellor laid no stress upon the limitation of the term for one thousand years, but decided the case entirely upon the construction of the whole will. The case of *Tarbutck v. Tarbutck*, cited by the other side, is only reported by Mr. Jarman in his Treatise on Wills, vol. 2, p. 375. The other side say that it proceeded merely upon the construction of the gift over; but it is clear that it proceeded upon the principle laid down in *Blackborn v. Edgley*, and *Morse v. Lord Ormond*. The true rule in these cases is well laid down in the cases of *Ellicombe v. Gompertz*, ubi sup.; *Hillersdon v. Lowe*, 2 Hare, 372; *Eno v. Eno*, 6 Hare, 171; s. c. 11 Jur. 746; and *Hamilton v. West*, 10 Ir. Eq. Rep. 75. As to the third and fourth constructions, this is a technically drawn will, and it is an established rule, that technical words are to receive a technical construction, unless there be something in the context to restrain them. *Jesson v. Wright*, 2 Bligh. 1. Here there is a clear gift to the daughters in fee; and the word "heirs" cannot be cut down to "heirs of the body" by the words of the gift over; that is never done, except where the gift over is to an heir of the prior taker; it is otherwise where the gift over is to a stranger; *Tilburgh v. Barbutt*, 1 Ves. 88; *Ginger v. White*, ubi sup.; and the limitation over here is to the right heirs of the testator, who must be strangers to the issue of John Baker, he being illegitimate. [They referred also to *Malcom v. Taylor*, 2 Russ. & M. 416, and *Egerton v. Jones*, 3 Sim. 409.]

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Humphry, in reply.

July 9, 1850. LORD BROUGHAM. My lords, in the case of *Baker v. Tucker*, I have to call your lordships' attention to the very able and elaborate argument last session, when my noble and learned friend, not now present, held the great seal, and at which I attended; and, in consequence of the importance of the point, rather, perhaps, than from any feeling that we had of any great doubt as to the conclusion at which we ought to arrive, at the close of the argument my noble and learned friend and myself thought that it would be better to postpone finally disposing of the question. The case arose out of a gift by will, to John Baker for life, remainder to his first and other sons in tail male; and in default of such issue, to the daughter or daughters of John Baker, to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants; and, in default of issue of the said John Baker, then over to the right heirs of the testator. There were powers of jointuring given John Baker, and of providing portions for younger children, and powers of leasing. Now the first observation that arises upon the structure of this will, is, that the word "such" occurs immediately after the limitation to the first and other sons of John Baker, in tail male,—and in default of such issue," then to let in the daughter or daughters; but, in the limitation "over," upon which the case turns here, it is, "and, in default of issue generally," then to the testator's right heirs. But it must be observed that this word "issue" may just be taken as if it had been preceded by the word "such," because it is clear that he first gave it to the first and other sons in tail male, and then, in default of such issue, to the daughters. Having by that gift given it to the daughters, he then says, "and in default of issue," which means the whole issue,—first, the issue of the sons; secondly, the issue of the daughters; and, in the latter case, in default of the second, he gives it as if it had been "such issue," which would be the last. Therefore, little will turn, in the consideration of the case, upon that. Now I take it that it is clear, that a gift over may undeniably affect the preceding gifts, if the words be inconsistent with those preceding gifts, taking effect according to the terms used in describing those preceding gifts. But in this will, it appears to me, there is no such inconsistency as to let in that modification between the terms of the gift over and the terms of the preceding gifts. All the children of John Baker are provided for: first, the sons, then the daughters, and then, in default of issue, not on *failure of issue*, but for want of such issue, to the testator's right heirs,—that is to say, if the prior gifts do not take effect: whereas, if we adopt the appellant's construction, the gift in tail male to sons must be enlarged to a tail general to let in daughters of sons, and the fee to the daughters must be cut down to an estate tail, in order to give effect to the gift over. Now this construction, which I think the words naturally and strictly bear, when duly weighed, is entirely in accordance with the current of decided cases. I shall not go through more of those cases upon the present occasion than appears to me absolutely necessary, some of them being really, I

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might almost say, on all fours with the present case. They are illustrated by such a case, for instance, as *Turk v. Frencham*, 2 Dy. 171. That was a gift to A B and the heirs male of his body, and if he died without issue of his body, over. This was held to be an estate in tail male to A B, and not in tail general. But if the argument used here as to the general failure of issue, and the want of issue generally, without specifying one particular kind of issue, were to avail, then in *Turk v. Frencham* there ought to have been an estate in tail general given to A B, the first taker, and not in tail male. I may observe upon this subject, that there is the case of *Goodright v. Dunham*, Dougl. 251, in which there is a great deal of important learning; and I would very particularly refer to the very able commentaries upon that and two other cases which are made at the same part of the book, in that most celebrated and justly celebrated work of Mr. Fearne on Contingent Remainders, where, at pages 375 and 376, your lordships will find an able commentary upon that case of *Goodright v. Dunham*.

But I now hasten to a case which, it appears to me, we must set aside and no longer look upon as law, if we decide contrary to the opinion of the court below, and according to the argument of the learned and very able counsel for the appellant—I mean *Blackborn v. Edgley*, 1 P. Wms. 600. Now that case was, no doubt, commented upon at the bar, in the course of the argument, and very ably commented upon; and, according to my recollection, for it is a long while ago, the learned counsel for the appellant, feeling the pressure of that case, and that it stood very much in their way, were at great pains in endeavoring to distinguish it from the present, without wishing to shake the authority of that decision. I think, Mr. Humphry, you did not deny the authority of that case,—so much as endeavor to show that it had not a decisive application to the case at the bar.

[*Humphry*. I attempted, my lord, to show that, upon the case, as reported, as your lordship remembers, and I afterwards obtained an extract from the registrar's book, which showed that the case had been very materially *misreported*.] I recollect that you said there was a doubt about the case; nevertheless, we must observe, that, if a case has been always supposed to be of one particular feature, aspect, and purport, and if that case, being uniformly supposed in subsequent cases to be such, and as such ruled those subsequent cases, it will not do to go back to some critical difference which may be raised respecting the authority of that case, because the law may have been settled. I will not even put it upon a wrong view of what the case was. But I do not think the difference here was so great as that; my recollection does not serve me so much. However, it is enough for me to say, independently of that case, that my present motion to your lordships, to affirm the decree below, does not rest merely upon the authority of decided cases, but upon the statement which I have made with respect to the purport and effect of the gift itself, and the terms in that gift. And in this I have great satisfaction in finding that the view which I take is precisely the same as that taken by my noble and learned friend who heard the cause with me, and from

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whom, when I sent to him a note of my opinion upon the case, and the grounds upon which it proceeded, I received in answer a complete confirmation of my opinion, he holding, in almost the very words which I had used, the same doctrine as I hold.

Now *Blackborn v. Edgley* was to A for life, without waste, remainder to trustees, to preserve contingent remainders, remainder to A's first and other sons, in tail male, remainder to his daughters in tail general, as tenants in common, giving jointuring powers also to A, and if A should die without issue generally, to B in fee. Now, Mr. Humphry, do you recollect, whether, in looking at the registrar's book, you found any other terms in which the gift over was couched?

[Mr. Humphry here read the limitation, as extracted from the registrar's book, as stated in the note to this case.]

It seems, then, to describe the dying there not so much without issue, as dying with the failure of issue.

[Humphry. Dying without issue behind him, pointing to the time of his death.]

No doubt.

[Humphry. Then, my lord, the terms of the decree were also very material. (He then read the decree, as stated in the note, *ante*.)]

My note of that case gives it, — held to be an estate for life in A from the antecedent parts of the devise, and not from the gift over. The court held that it was not in respect of the gift over, but in respect of the antecedent parts of the devise, and they held it to be an estate for life in Hewer Edgley.

[Humphry. Yes, my lord; and your lordship sees here that there was no ground from the ultimate gift over, the words being, "without issue behind him," to contend for an estate tail, because it did not point to the indefinite failure of issue.]

The case of *Morse v. Ormond* does not bear so close an analogy to the present case, and, therefore, I do not so much rely upon it; nevertheless, *Morse v. Ormond*, 5 Mad. 99, entirely adopted the principles laid down in *Blackborn v. Edgley*.

And then we have the case of *Graves v. Hicks*, 5 Ad. & El. 38; 11 Sim. 536 — a very material decision. It was a gift to A for life, remainder to trustees, to preserve contingent remainders, remainder to the first and other sons, in tail male, and, on failure of such issue, to others. The fourth codicil, which was the material point, refers to the will, but devises that, "on failure of issue of the said J. G.," the estate shall go over. In this case, which was argued, the court gave no opinion of their own, in consequence of that very bad practice which I hope now has been given up; I believe it has; I did all I could to prevent its being continued. Because Lord Thurlow chose to carp at the arguments of the learned judges, they said that they would not do more than certify their opinion, without any argument, contrary, in my opinion, to their duty. While that bad practice prevailed, the court gave no argument, but only said, "This case has been argued before us by counsel, and we are of opinion that the plaintiff J. G. takes an interest for life under the will and codicils mentioned therein;" meaning, chiefly, the second and fourth codicils.

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My lords, in the case of *Blackborn v. Edgley* it is said, "Here being a limitation upon Hewer Edgley's death, to his sons, and after to his daughters, the following words, 'if Hewer Edgley should die without issue,' must be intended, 'if he should die without *such* issue.'" And as to what had been urged, that unless these words were to create an estate tail in Hewer Edgley, his son's daughters could not take, Lord Macclesfield, a very high authority, says, "It did not appear that the testator intended Hewer Edgley's son's daughters should take, for he might think that, on Hewer Edgley dying without male issue, his name and family would be determined; for which reason he might limit it over to the daughters of Hewer Edgley himself. Besides, the son of Hewer Edgley would be tenant in tail, and when of age, might, by docking the entail, give the premises to his daughters."

With respect to the case of *Doe v. Halley*, 8 T. R. 5, upon which great reliance has been placed, both in the argument in the court below and in the argument here, (less here, perhaps, than below,) I have certainly to observe here, with respect to the argument in the court below, that I have seldom seen any case more ably argued, as reported in the Irish Equity Reports, particularly the argument beginning at p. 106, for the plaintiff, the present respondent, and afterwards the argument for the present appellant, the defendant. I am bound in justice to say, that I have seldom seen a case more ably argued; the judgment, also, is deserving of very great commendation, — it is a most excellent and elaborate judgment. But, without referring to it more particularly, the case of *Doe v. Halley* is commented upon by the learned counsel at pp. 108, 109; and, in order to show that that ought to make no difference in the decision of this case, for which it is cited, I need only say that that case is, in my opinion, ably got rid of, and ably shown not to apply to the case at the bar. I need not, therefore, further refer to it, nor to the case of *Bamfield v. Popham*, and other cases, which I intended to comment upon. So much rests upon the cases of *Graves v. Hicks* and *Blackborn v. Edgley*, that I shall not detain your lordships longer with any such cases. My lords, upon these grounds, and mainly upon my construction of the terms of this gift, to which the authorities lend weight, no doubt, but which seem to me almost superfluous, from what appears to me to be so manifest a propriety in that construction, I have arrived at the same conclusion as my noble and learned friend, not now present, and at the same conclusion as the court below. I am of opinion that John Baker took an estate for life only, notwithstanding the terms of the gift over; and that, therefore, the decree of the court below ought now by your lordships to be affirmed.

Appeal dismissed.

Drummond and another, Appellants, Attorney General and others, Respondents.

THE REV. WILLIAM HAMILTON DRUMMOND, D. D., and another, Appellants, and HER MAJESTY'S ATTORNEY GENERAL and others, Respondents.¹

February 23 and 24, 1848, and July 31, 1849.

Protestant Dissenters — Unitarians — Evidence — Time — Breaches of Trust.

In 1710 certain members of five Presbyterian congregations in Dublin set on foot a subscription, for the purpose of forming a fund for charitable purposes, which, by a deed of trust, was declared to be for the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable persecutions; and for the education of youth designed for the ministry among Protestant dissenters, and to be chosen out of these five congregations. The funds subscribed were vested in trustees chosen. At the date of this deed there was no Toleration Act for Ireland. In course of time, Unitarian doctrine sprung up in several of these congregations, and for many years past portions of the income of the fund had been applied to Unitarian purposes, and the majority of the present trustees were Unitarians. Upon an information filed against the trustees:—

Held, affirming the decision of the Lord Chancellor of Ireland,

First, that the expression "Protestant dissenters" had no such known legal meaning as to prevent the admission of evidence; and that theological works of the period might be admitted in evidence to show the meaning of those words, as understood and used by the authors of the trust.

Secondly, that Unitarians are not entitled to be considered as objects of the trust.

Thirdly, that it was not open to Unitarians claiming under the trust to contend that the trust was originally invalid, by reason of there not having been any Toleration Act at the date of the deed.

Fourthly, that long enjoyment of the Unitarians created no right; as time affords no sanction to established breaches of trust.

Fifthly, that Trinitarian trustees, who had concurred in the breaches of trust, should be removed, as well as Unitarian trustees.

THIS was an appeal from a decree of the Court of Chancery in Ireland, pronounced by Lord Chancellor Sugden on the 27th November, 1842, in a suit instituted for the regulation of a charity founded by certain Presbyterians in the city of Dublin, pursuant to a deed of trust, dated the 1st May, 1710. The decree declared, that, according to the true construction of that deed, anti-Trinitarians could not be either trustees or beneficiaries of the charity. By an ordinance of the Parliament, passed in the year 1649, the Presbyterian form of church government, with the Westminster Confession of Faith, was established as the National Church of Ireland, as, by a similar ordinance in the year 1646, it had been established as the National Church of England. Upon the restoration of Charles II., the Episcopal form of church government was restored in England and Ireland; and by the Act of Uniformity, passed by the Parliament of Ireland in the 17 and 18 Car. 2, all clergymen who would not, against the 29th September, 1665, submit to be episcopally ordained, and conform to the rites and ceremonies in the Book of Common Prayer, were deprived of their livings. In consequence of this act, various Presbyterian

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ministers in the city of Dublin, declining to comply with its provisions, quitted their benefices, and, with such of their former parishioners as adhered to them, founded five nonconforming congregations in that city—one in Wood Street, one in Cook Street, one in New Row, one in Plunket Street, and one in Mary's Abbey. From the year 1665 to the revolution in 1688, the Irish nonconformists endured persecutions similar to those of England and Scotland; but, upon the arrival of King William III., the Presbyterians of Ireland presented him an address of congratulation, and a petition for toleration and state endowment, which were so well received by the King, that when in Ireland, in the year 1690, his Majesty placed a permanent charge, in favor of the Presbyterian ministers, on the revenues of that kingdom, to the amount of 1200*l.* a year, usually called the "Regium donum," and which, being increased with the increasing Presbyterian population of Ireland, now amounts to 35,600*l.*, and is annually voted by Parliament. From the accession of William III., the sufferings of the Irish Presbyterians were much mitigated; but although, from the year 1690, they annually received state endowment, yet, until the year 1719, no act of toleration was passed as to them.

In 1710, Sir Arthur Langford, Bart., and Joseph Damer, Esq., with other members of the aforesaid Presbyterian congregations in Dublin, conceiving the idea of forming a general fund for the charitable purposes hereinafter stated, subscribed considerable sums of money; and, in order to the due management thereof forever thereafter, according to the true intentions of the founders, they, on the 1st May, 1710, executed a deed of trust of that date, reciting as follows: "Whereas, from a pious disposition and concern for the interest of our Lord Jesus Christ, and the welfare of precious souls, Sir Arthur Langford, Bart., and Joseph Damer, Esq., with divers other well-disposed Christians, have designed and intended to set on foot a stock or fund for the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable persecutions, some of which they have lately been exposed to, contrary to her Majesty's sentiments publicly declared; and for the education of youth designed for the ministry among Protestant dissenters; and for assisting Protestant dissenting congregations that are poor and unable to provide for their ministers; and for such other pious and religious ends, and by such means, as shall by the subscribers hereunto be thought proper and reasonable for promoting the design and intention herein expressed. And the several subscribers hereunto, having first solemnly and earnestly implored the divine assistance and blessing, have mutually engaged, in the presence of God, to employ the utmost of their integrity and faithfulness, with all necessary care and diligence, in the pursuit of those rules and methods hereinafter unanimously agreed to by them, and which shall or may be hereafter added thereunto, for the accomplishing and carrying on so good a work." Directions then follow for the insertion of any legacies or donations in a registry book, and the deed proceeds: "Thirdly, that there shall always be two of the said books of registry, exactly duplicates, the one to remain in the custody of the

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registrar, and the other in the custody of one of the ministers of a dissenting congregation in Dublin, to be chosen as hereafter is appointed; and since a corporation by charter is not, on this occasion, to be expected or attempted, and seeing deeds of trust and conveyances are still liable to many contingent hazards and inconveniences, it seems best to place the great security of the present undertaking (next to the blessing and protection of God) upon the faithfulness and integrity of the persons herein named to be trustees, being the ministers of the several dissenting Protestant congregations in Dublin, and two out of each of these congregations, [here follow the names,] whom we do hereby constitute, consent, and agree to be the trustees and managers of the said fund, together with all and every the additions that shall be made thereunto, and increase thereof; and that they, or the major part of them, being eleven at least of the whole number duly summoned, who shall be in and about the city of Dublin, shall order, manage, dispose, and direct, set out at interest, or otherwise, to the best advantage, as to them shall seem most fit, the present fund, together with the additions and increase thereof, from time to time, to the use, interests, and purposes aforesaid."

The fourth, fifth, sixth, and seventh rules relate to the keeping of the books of the trust, and the routine duty of the registrar. By the eighth a succession in the trusteeship is provided for, viz.: "Whereas the present members herein named are the ministers of the several Protestant dissenting congregations associated at present in Dublin, and two out of each of their said congregations nominated by the said several respective ministers, a succession of whom it is hereby designed and intended should be the constituent members or trustees for the uses herein mentioned, together with such other ministers as may be chosen to the pastoral charge of the said congregations, and such donors as shall advance 100*l.* towards the said fund, if they desire the same: it is hereby covenanted and agreed to, that, as often as any of the said members die or be displaced, in the room of a minister, such other minister as shall regularly succeed to such congregation shall succeed to the said trust; and in the room of any of the said members of a congregation, one of the said congregation shall be chosen by ballot: all which shall be done by the unanimous agreement of the said trustees, or three fourths of them present, and the said member of a congregation to be chosen out of two, to be named by the respective minister or ministers of the said congregation; and upon any such election, or any matter of moment, the whole number of members to be summoned by the moderator for the time being, who is likewise obliged to issue such summons, as often as any three members require the same." The ninth rule provides, "that as often as any deed, gift, grant, annuity, or legacy, be made for the use of this fund, it is thought proper that the same be advised to be made to two of the said trustees that are not ministers, and to be expressed to be made to them to such pious and charitable uses as they shall think fit, without any mention of this fund." The tenth rule applies to the trusts being declared of all

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such subsequent donations or bequests: and the eleventh requires newly-appointed trustees to indorse on the deed their acceptance of the trust, "and solemnly, in the presence of God, oblige themselves to act with the said other trustees, with all necessary diligence and faithfulness, in the execution of the said trust, according to the covenants, rules, and agreements herein mentioned, and any other that shall be added, as aforesaid." The twelfth rule provides for the investment of the fund; and the original trustees declared their acceptance in these words, viz.: "Now, know all men whom it may concern, that we have, and by these presents do accept of the said trust, and do hereby acknowledge, that, in pursuance thereof, we have received into our custody and management the present stock or fund of the subscribers, and which is entered in the registry herein mentioned, amounting in the whole to the sum of 1500*l.*; which said sum, together with the interest or increase thereof, with what addition shall be made thereto by any person or persons whatsoever, we do humbly promise, testify, and declare shall remain, be, and continue to the uses, intents, and purposes aforesaid; and that the issue, product, and increase thereof shall be in like manner fairly and justly disposed to the uses, intents, and purposes aforesaid. And that we will, from time to time, follow and pursue the articles and rules, according to the method herein prescribed and directed, and which shall hereafter be added hereunto, for the better order and government of the said fund; and for the exact registry of the several donors, and their respective grants or subscriptions; and for the executing the said trust in every particular with the utmost fidelity, integrity, and all necessary care, according to the best of our skill and knowledge, as in the presence of the Great God, to whom we must shortly give an account." Various additions were subsequently made to the 1500*l.* mentioned in the deed, by bequest and otherwise, which formed an aggregate fund of 7670*l.*, and this was, in the year 1734, invested in the purchase of lands near Dublin, now yielding 700*l.* a year, forming the income of the charity. Certain changes have, since the year 1710, taken place in the five original Dublin Presbyterian congregations. The congregation of New Row removed, in 1728, to a new meeting-house, which they erected in Eustace Street. In 1764 the Wood Street congregation removed to a new meeting-house in Strand Street; and in 1787 the old congregation of Cook Street (the meeting-house of which had fallen greatly into decay) united themselves with the congregation of Strand Street. Some disputes arising in Plunket Street congregation, the minister, with part of the members, left that meeting-house in 1773, and united themselves with the adjoining Presbyterian congregation of Usher's Quay, which had not been a party to the original trust of 1710. In the lapse of time the ministers and congregations of Strand Street and Eustace Street adopted Unitarian sentiments, and taught and professed Unitarian principles, thereby denying the divinity of our Lord Jesus Christ. It did not precisely appear at what time Unitarian doctrines were adopted by these congregations, but it seemed probable that it was as far back as sixty or seventy years.

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The majority of the trustees now being Unitarians, and making grants in favor of Unitarians, an information was filed in the year 1840, by her Majesty's Attorney General, in the Court of Chancery in Ireland, at the relation of George Matthews and others, Presbyterians, against all the trustees of the charity, alleging in substance to the above effect, and further, that all the founders of the said charity, and the original trustees, believed in the doctrine of the Trinity; and it prayed that the aforesaid charity might be established according to the true construction of the said deed of the 1st May, 1710, and the intent of the parties thereto, as therein expressed; and that it might be declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the said charitable fund; and that such of the defendants, the trustees, as should appear to hold doctrines at variance with those of the founders of the said trust fund, might be removed from being trustees.

Twelve of the trustees who were Unitarians, with four Trinitarians, answered together, justifying their administration, and expressing their readiness to go on making grants equally for the promotion of Trinitarian as of Unitarian doctrines. They, in answer to one part of the bill, said they were unable to set forth whether all the parties to the said deed, and all the original contributors to the said fund, were believers in the doctrine of the Trinity, as held by the Established Church of England and Ireland, or believed that our Lord Jesus Christ was entitled to divine worship and adoration, but considered it as highly probable, and therefore were willing to admit that most, if not all, of the said parties and contributories were believers in the said doctrine. But they contended that the five Dublin congregations were not founded upon the belief of Trinitarian or of any particular doctrine or religious opinions; that their only tie or bond of union, and basis of association, was the rejection of subscription to the Westminster Confession of Faith, or to any other creed — a principle, they alleged, as compatible with Unitarianism as Trinitarianism; and that, as this charity was founded by Protestant dissenters, and all the trustees and beneficiaries (notwithstanding non-agreement of belief in the Holy Trinity) were Protestant dissenters, and as no articles of religion were specially set forth in the deed of foundation, it was no breach of trust in any trustees or beneficiaries to be of the Unitarian persuasion.

Three other Trinitarian defendants answered by themselves, but not precisely to the same effect; and the two remaining Trinitarian defendants answered substantially, although separately, as their three co-trustees. Historical and ancient documentary evidence, and extracts from theological works, were read and referred to both by the relators and the defendants, the latter objecting to the admission of extrinsic evidence to aid in the construction of the deed of 1710. Theological writings of the date of the foundation, and prior thereto,

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were referred to by the relators, to prove that the founders were Trinitarians, and that at that time the publicly received and acknowledged sense and meaning of the term "Protestant dissenter" was expressive of a Trinitarian Protestant dissenter alone. The Irish Toleration Act, passed in 1719, was referred to, as showing that it excluded from its benefit all persons denying the doctrine of the Holy Trinity, which statutory disability was not removed until the year 1817. It was also proved, by the evidence referred to by the relators, that the Rev. Thomas Emlyn, who was a minister of one of the five Dublin Presbyterian congregations, was deposed from the ministry by the presbytery of Dublin in the year 1702, in consequence of his professing Unitarian opinions, and was subsequently tried and punished by the secular Court for publishing a work in favor of Unitarian doctrines. The evidence referred to, on the part of the defendants the Unitarians, was for the purpose of showing that the distinctive feature of Presbyterianism, in 1710, was non-subscription, or anti-Episcopalianism; and that the scheme for the foundation of the charity had reference to that alone, and was wholly irrespective of any peculiar confession of faith amongst Protestant dissenters.

For the appellants, it was contended that the decree could not be supported, for the following reasons:—

First, because the trusts or purposes in question were, so far as they were charitable, altogether illegal at the time of their constitution; and inasmuch as the purposes, though illegal, were of a charitable nature, the decree ought to have directed the application of the trust funds to such purposes of charity as the Crown, by sign-manual, should appoint.

Secondly, because, if the long enjoyment be a ground for waiving the original illegality of the trust, (which seemed to have been the view of the Court below,) the usage during that time, and not the original illegal intention, must be looked to, in order to determine the objects of the trust.

Thirdly, because the decree proceeded upon evidence not properly receivable in the cause.

Fourthly, because, even if the evidence objected to be received, it does not warrant the conclusions which were drawn from it.

Fifthly, because not only Unitarian, but also Trinitarian trustees were removed.

Rolt and R. Palmer, for the appellants. First, the trusts were illegal. There was no Toleration Act for Ireland until the year 1719, (when the act 6 Geo. 1, c. 5, was passed,) and therefore, at the date of the deed of 1710, no Protestant dissenters could legally exercise their functions as a religious body. The Irish Toleration Act was

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not retrospective; and notwithstanding that act, the trust property remained subject to all the consequences of the trusts having been invalid at the time of their creation. *Bradshaw v. Tasker*, 2 My. & K. 222, had reference to a totally different state of circumstances, and is quite consistent with the Irish Toleration Act not being retrospective; and the case of *The Attorney General v. Todd*, 1 Kee. 803, confirms this view of the subject. Sir Edward Sugden was of opinion that the act was not retrospective, but he got over the difficulty in this manner: he says, "But if, as in this case, the Court finds in the possession of a body a fund which they have enjoyed for a century and a half, although by the law, as it stood when the trust was created, they were not entitled to hold it, but the disability to hold is by law removed, and there is no adverse claimant, I think the Court is warranted in executing the trust." With great deference, that reasoning was erroneous; for the right of the Crown, under its sign-manual, to nominate a charity, instantly attached; and the maxim, "*Nullum tempus occurrit regi*," prevents the Crown's right being barred.

Secondly, if any effect was to be given to the lapse of time on the trusts, the decree should have either dismissed the information, or have regulated the charity on the footing on which it had been administered by the appellants and their predecessors for the last century, which was for the benefit of a mixed body, one half Trinitarians and the other half Unitarians.

Thirdly, evidence of surrounding circumstances, to show in what sense the term "Protestant dissenters" was used, was improperly admitted; for it is an established rule of evidence, that if the words to be construed have a legal meaning, or a strict and primary meaning, and if the state of circumstances existing at the time the instrument comes into operation admits of effect being given to that legal meaning, the words in question must be construed according to that legal meaning, and cannot be controlled by any evidence manifesting an intention to use them in any other sense. The simple words here are, "Protestant dissenters"—they are to be the donees; but "Christians" were appealed to as the donors—these might have been Episcopalians. The term "Christians" is unimportant in the construction of the deed in defining the recipients, and Sir E. Sugden, in his judgment, attributed improper weight to the term. But, even admitting the term "Christians" into consideration, each of the three words has its strict legal force and value, and had, at the date of the deed, the same meaning as at the present time. The word "Christians" confines the definition to those who receive the Scriptures as containing the revealed will of God; the word "Protestant" excludes Roman Catholics; the word "Dissenters" excludes members of the Church of England. The only doubt that can be raised, is upon the word "Christians," which we say is not material to the construction of the trust. The judgment assumes that the simple term "Christians" implies that the persons spoken of are Trinitarians, and that a Unitarian claiming to be called a Christian must be content to be called a "Unitarian Christian;" but this the appellants deny, and submit that the term "Christians," uncon-

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trolled, has the larger signification above mentioned; and that there is no expression in the deed which is not capable of being applied to any sect of religionists, whatever their belief, provided their religion is founded on an adoption of the Scriptures, and provided they protest against the opinions of the Church of Rome, and dissent from the Church of England. It is a fact, common both to the case of the appellants and the respondents, that, at the date of the deed, there existed a recognized class of persons whose religious belief was founded on the Scriptures, and who dissented from the churches both of Rome and England, and that such persons were designated in acts of Parliament as Protestant dissenters. Unitarians are within that class, for they adopt the Scriptures as their rule of faith, and they dissent from both the churches of Rome and England. The opinions of all the judges, delivered in this House in *Lady Hewley's Case*, (an abstract of these opinions is reported in 7 Jur. 787,) show that Unitarians are not to be excluded by force of such a general term as that of "Christians." And even were it proved, that, at the date of the deed, there was no such class of religionists as Unitarians, still the term must embrace such persons as soon as they came into existence. The circumstance of one class of dissenters insisting that the other, who claims to be included, is excluded, does not create such an ambiguity as warrants the admission of extrinsic evidence; yet it was upon this ambiguity that Sir E. Sugden admitted the evidence. The distinction taken in the judgment between the admission of evidence to show what were the *opinions* of the founders, and what they *did*, is without foundation; for there could be, and in fact in this case there was, no purpose in showing what they *did*, except as thereby showing what their opinions were. If it were right to get at their opinions, evidence of what they did might be the best mode of getting at them; but the objection is to the admissibility of their opinions, however got at. A sensible construction can be put upon the deed without resorting to their opinions, which cannot therefore be referred to.

Fourthly, even giving all due weight to the evidence which was received in the Court below, it did not warrant the conclusions which were drawn from it. In substance, that evidence tends to show that the congregations of Protestant dissenters in Dublin, at or about the date of the deed, were Trinitarian Christians, and that Unitarian opinions were then generally held amongst them in great odium. It also shows that the founders of the charity were quite aware of the extent to which anti-Trinitarian opinions had attracted public attention, which makes it difficult to assume that they intended to exclude persons holding those opinions, yet left such intent unexpressed.

From the history of dissent, as bearing upon the position of the founders, the following conclusions are deducible: first, that the motive for accumulating the trust fund, and the first object of the fund, was the protection of the *civil rights of all Protestant dissenters*, without reference to doctrine, *against attack by Episcopalians*; secondly, that the advancement of Protestant dissent, by other means than such protection, was a subordinate object of the trust, to which the surplus of the fund was to be applied, and that in this subordinate object there was no sectarian intent;—thirdly, that even if a

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sectarian, on the part of those who created the fund, is to be inferred in favor of their own body, the appellants do, in fact, belong to and represent that body; and that the rise and ultimate prevalence of anti-Trinitarian opinions, as well in their body as in the non-subscribing bodies of England, Geneva, and America, are but the development of the anti-creed principle, which was at the date of the deed, and still is, the essential principle of their sect.

Fifthly, the decree is wrong, because it has removed Trinitarian dissenting trustees as well as Unitarian trustees, and this on the sole ground of their having joined in a common answer with the Unitarian trustees, notwithstanding the rule, that *trustees* are not to sever in defence, and although no disqualification for the office of trustees was proved against them, nor an imputation made of any wilful misapplication of the fund.

Kindersley and *Malins*, for the respondents, made numerous references to history, and to theological works published by the original trustees and ministers of the Dublin congregations, prior and subsequent to the foundation of the charity, to prove the Trinitarian character of the founders; and it was submitted for them, that the decree should be affirmed, for the following reasons: First, because the founders of this charity were Trinitarian Presbyterians, and strongly opposed to any impugner of the doctrine of the Trinity; and the application of any part of the charity to the benefit of ministers, congregations, or students of divinity holding anti-Trinitarian, or what are commonly called Unitarian, belief and doctrine, was and is inconsistent with the intention of the founders and the language and scope of their deed. Secondly, because the trustees had systematically concurred in breaches of trust, and it was and is contrary to the design of the founders, that any of the ministers or laymen in whom successively the trusteeship of this charity is vested by the deed of trust, should be of anti-Trinitarian doctrine and belief.

The appeal was argued on the 23d and 24th February, 1848.

July 31, 1849. LORD BROUGHAM. My Lords, I attended this case with my noble and learned friend near me, and also my noble and learned friend Lord Cottenham, whose absence in this case we have to lament, on account of the cause of it—indisposition—but on no other account, because he has made up his mind, and communicated with us upon the subject. I have received from him a corrected copy of his opinion, which I am now about to read to your Lordships, and in which I entirely coincide. It is a case of great importance, and, whatever opinion we might have had before the case of *Lady Hewley's Charity*, I do not consider that we can do otherwise than the Court of Chancery in Ireland did, namely, to follow the principles there laid down. "It appears to me," says his Lordship, "that the rules and principles acted upon in *Lady Hewley's Case* govern the present. The cases, indeed, are very similar. In *Lady Hewley's Case* the principal question was the meaning of the founder's words, 'godly preachers of Christ's holy Gospel,' and whether Unitarians

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were included in that description. In the present case the question is, the meaning of the founder's words, 'Protestant dissenters,' and whether Unitarians are included in that description. In *Lady Hewley's Case* the evidence used below embraced a wide range, much of which was probably not properly receivable; but there was sufficient evidence, free from all objection, to enable the judges and this House to come to a satisfactory conclusion upon the meaning of the words, and the disqualification of Unitarians. In commenting upon the opinions delivered by the learned judges upon the question of the admissibility of evidence, I observed, that the evidence which went to show the existence of a religious party, by which the phraseology found in the deed was used, and that Lady Hewley was a member of that party, was clearly admissible, being, in effect, no more than evidence of the circumstances by which the author of the instrument was surrounded at the time. The appellants, indeed, in this case, attempted to distinguish the two cases, on the ground that, although no distinct meaning could be attributed to the mere words 'godly preachers of Christ's holy Gospel,' the words 'Protestant dissenters,' had a known legal meaning; and therefore, in the absence of ambiguity, evidence of the meaning of these words could not be received. It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them. The expression 'Protestant dissenters' does, indeed, of itself, imply that the parties are protestants against the Church of Rome, and dissentients from the Church of England; but that is all. It cannot include all those who are neither of the Church of Rome nor of that of England, for that would include all those who reject Christianity altogether; nor all those who, to some extent, admit the divine mission of Christ, for do not the Mahometans do that? What classes and what description of persons are included is uncertain from the terms used, and therefore matter of proof. The appellants, indeed, refer to acts of Parliament and other documents, for the purpose of showing that Unitarians have been included in the general term 'Protestant dissenters.' If this be admissible for the appellants, it is clearly open to the respondents to adduce evidence to prove that such was not the sense in which the words were used by the founders of this trust, which is, in truth, the whole question.

"It appears to me clear, that, upon the principle of *Lady Hewley's Case*, and within the limits acted upon in that case in this House, evidence of the meaning of these words, 'Protestant dissenters,' as understood and used by the authors of this trust, is admissible.* Some important points are certain from the deed itself, such as, that the trust originated with the members of certain congregations of dissenting Protestants in Dublin; that they professed that the constitution was founded upon a pious disposition and concern for the interest of our Lord Jesus Christ, and that its object was the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable persecutions, and for the education of youth designed for the ministry amongst Protestant dissenters, and for assisting Protestant dis-

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senting congregations that were poor, and unable to provide for their ministers. It is established, beyond all doubt, that these congregations professed Trinitarian doctrines; that there were not, at that time, any Unitarian congregations or ministers in Dublin or the south of Ireland, although there were individuals who professed those doctrines. Looking, then, to the declared objects of the trust, those who had no congregations or ministers, and who had not, in the opinion of the founders, been subject to any unjust persecutions, could not have been in the immediate contemplation of its authors; but still they may have had intentions so liberal and enlarged as to embrace objects not immediately contemplated, but such objects must have been within their general intentions, and within the mischief they proposed to guard against. They must have been Protestant dissenters within the sense in which the authors of the trust understood and used this description.

"The inquiry, therefore, is, were Unitarians or Unitarian Christians included in this description, as so understood and used? The evidence, I think, proves that they were not. The quotations in evidence from theological works of ministers of those congregations, at or about the period of the trust, prove the abhorrence in which they held the Unitarian doctrine. This cannot be more strongly expressed than in the extract from the sermon of Samuel Mather: 'If any man deny one God and three Persons—deny the Scriptures, the deity of Christ, the immortality of the soul, the resurrection of the body, or such like fundamental points, it is the duty of the church to cast him out; he is unclean.' So his brother, Nathaniel Mather, says, 'This belongs to Christ: He is God, coequal with the Father and the Holy Ghost, being one of the blessed perfections of the Divine Essence;' and after speaking of the opinion of Papists, Socinians, semi-Socinians and their followers, says, 'Grotius indeed does the same, and I learn that Arminians and Socinians do so too, but I do not reckon Grotius or them amongst Protestants.' Many other extracts to the same effect were produced, but that which is most conclusive is what appears in Emlyn's History and Narrative, and the reply to it by Mr. Boyse, one of the authors of this trust. Emlyn complains of these congregations and their members, as having taken part against him; and the Irish Convocation, in their address to the Crown, claim credit for having so done, and declare that there are no people in the world whose principles and practices are more opposite to Deists, Socinians, and all the enemies of revealed religion, and to Papists, than they were and ever had been. It is useless, after this, to refer to more evidence upon this point. The authors of this trust, at the time it was created, were professed Trinitarians, and not only disclaimed all connection with or sympathy for those who professed Unitarian doctrines, but held them in abhorrence, and publicly declared such to be their opinions, denying that such Unitarians were Protestants or Christians. Can it, then, be supposed that the authors of the trust in question intended to associate with themselves as *cestuis que trust*, those whose doctrines they so abhorred and condemned? Is not the sense in which the words 'Protestant dissenters' were used by the

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authors of this trust made clear beyond all question? They denied the right of Unitarians to the appellation of Protestants or Christians, and could not, therefore, intend to include them in the description of Protestant dissenters.

"It appears to me, therefore, that the decree of the Lord Chancellor of Ireland was correct, in declaring that Unitarians are not entitled to be considered as objects of the trust. Other objections were raised to the decree, which may be disposed of in very few words. It was said, that, there being at the time no Toleration Act for Ireland, the whole trust was illegal. Now, if the illegality were proved, the question would arise, how can these appellants raise that objection? They claim under the trust, and show no other title to be heard. Secondly, it was urged that long enjoyment gave title to the Unitarians. Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions; but time affords no sanction to established breaches of trust. It was also objected that the decree removed some Trinitarians, as well as the Unitarian trustees; but this was sanctioned by the decree in *Lady Hewley's Case*, and is right upon principle. The decree, proceeding to correct a breach of trust, removes those trustees who were the authors of it, for that is of itself a sufficient ground of removal common to both classes. Therefore," his Lordship says, "I advise your Lordships to affirm the decree, with costs."

My Lords, the only point upon which I entertain the least doubt is, whether his Lordship does not express too doubtfully the inadmissibility of some of the evidence which was received in the court below in *Lady Hewley's Case*; but I think he is quite right in his argument upon the admissibility of the evidence which was received in this case, and that the evidence was admissible in this case, for the purpose of showing the circumstances in which the party was when making the instrument. You admit it as you admit evidence in construing a will — not to modify the expressions of the will — not to affix a sense upon the will which it does not bear — not to tell you what the meaning of the will is — but to tell you what were the circumstances in which the testator was when he used those expressions — for the purpose of enabling you to ascertain what meaning he affixed to the expressions which he used, and for no other purpose. There was nothing further done in this case, and it is clear that the evidence was admissible. I, therefore, entirely agree with the view taken by my noble and learned friend, and move your Lordships that this appeal be dismissed, and that the judgment below be affirmed, with costs.

LORD CAMPBELL. My Lords, as my noble and learned friend has alluded to *Lady Hewley's Case*, I have no difficulty in saying that I am clearly of opinion now, speaking judiciously, that there was a great deal of evidence admitted in *Lady Hewley's Case* which ought to have been rejected. There was abundant evidence to support the decree. Of course we are bound by that decree, because it has received the sanction of this House, and I think that the evidence which was admissible there was abundant for the purpose of supporting the decree.

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But in *Lady Hewley's Case* there were admitted, and reasoned upon, by the Vice Chancellor of England, and partly by Lord Lyndhurst, declarations made by Lady Hewley, as to the particular sense in which she used particular words, or rather evidence tending to show the sense in which the words were used by Lady Hewley. Now that, I apprehend, is clearly inadmissible. On general principles, I adhere to what I contended at your Lordships' bar, when I was counsel in *Lady Hewley's Case*, and which I find the Lord Chancellor of Ireland has done me the honor to adopt, and to say, that it is the canon by which he has himself been guided, namely, that, in construing such an instrument, you may look to the usage to see in what sense the words were used at that time of day. You may look to contemporaneous documents, as well as to acts of Parliament, to see in what sense the words were used in the generation in which the deeds were executed. But to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle; and I think my noble and learned friend, the present Lord Chancellor, could not have any doubt at all in rejecting such evidence. My Lords, adopting that canon, I really do not think that there is any reasonable doubt in this case, because what we have to determine is the meaning of the words "Protestant dissenters" in the deed constituting this charity—not what may be the meaning of the words "Protestant dissenters" in the reign of Queen Victoria, because I have no doubt now, that, upon most occasions, Unitarians would be considered as Protestant dissenters. Since the repeal of the act of Will. 3, against impugning the doctrine of the Trinity, they have not been liable to any penalties; and it would be very unchristian to say that they are not Christians. They are dissenters, and, therefore, I apprehend they may be properly denominated "Christian dissenters," and that they are "Protestant dissenters;" but, at the same time, we are to look at what they were when this charity was founded. At that time, I think, the evidence is abundant to show that the authors of the charity would not have considered Unitarians as "Christian brethren;" that they would have looked upon them with great horror, and never would have called them "Protestant dissenters;" and, therefore, they cannot be considered as included in the description of those for whom this charity was founded. That being the case, the decree pronounced by Sir E. Sugden seems to me to be perfectly correct. Enjoyment might be evidence, if it were doubtful how far Unitarians were included; but, assuming that Unitarians are excluded, the enjoyment must go for nothing. Then, as to the other point, that the purposes of this charity cannot, by law, be carried into execution, and that the funds must be disposed of by the sign-manual of her Majesty, I entirely concur in the opinion that that argument cannot be entertained by your Lordships. I do not think it necessary to enter more at large into this subject, which has been already so ably discussed; but, upon the whole, I entirely concur in the opinion that the judgment of the Court below should be affirmed, with costs.—*Appeal dismissed, with costs.*

CASES

ARGUED AND DETERMINED

IN THE SEVERAL

COURTS OF CHANCERY;

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

MORRELL *v.* WOOTTEN.¹

November 7, 1850.

*Production of Documents — Banking Firm — Deceased Partner —
Executors — Parties.*

A defendant admitted that certain documents were in the possession of himself and W. C. his co-executor, and that others were in the possession of their solicitor, W. C. not being a party to the suit:—

Held, that an order for production could not be made against the defendant on such an admission.

THIS was a motion on behalf of the plaintiff, James Morrell, that the defendant, Richard Wootten, might produce and leave in the hands of the clerk of records and writs the several deeds, papers, and writings admitted by his answer and in the schedules thereto, to be in his custody, possession, or power; that the plaintiff might be at liberty to take copies; and that the originals might be produced on the examination of witnesses and at the hearing.

The bill in this case was filed by James Morrell, who, previous to the year 1846, carried on the business of a banker at Oxford, in partnership with Robert Morrell, since deceased, against Richard Wootten, the partner and also one of the executors of Richard Wootten the elder, deceased, who were also bankers at Oxford, and against James Foster Groom, the official assignee, and Emanuel Cooper, the creditors' assignee of John Parker, a bankrupt, and customer of Messrs. Wootten, to obtain payment of a sum of 2081*l.*, which had been deposited with Messrs. Wootten by John Parker, to abide the event of an appeal against a decree of Vice Chancellor Knight Bruce.

It appeared that in a suit of *Parker v. Morrell*, Vice Chancellor Knight Bruce directed an issue, upon which the plaintiff, John Parker, was examined as a witness for himself, and upon the equity

¹ 20 Law J. Rep. (N. S.) Chanc. 81.

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reserved a decree was made, directing Messrs. Morrell to pay to John Parker the sum of 2024*l.* 16*s.* 3*d.* 17 Law J. Rep. (N. S.) Chanc. 226.

Messrs. Morrell appealed to the lord chancellor against this decree, but before any judgment was given, John Parker, at the instance of Messrs. Wootten, compelled payment of the sum of 2024*l.* 16*s.* 3*d.*, and paid 2000*l.* into their bank to the credit of his account upon an agreement dated the 23d of July, 1847, and made between Messrs. Wootten of the one part, and John Parker of the other part, by which Messrs. Wootten, for themselves, their executors and administrators, and for their banking firm for the time being, jointly and severally agreed with John Parker, his executors and administrators, that in the event of the judgment on the appeal being given in favor of Messrs. Morrell, and of John Parker being ordered by the court of chancery to pay to Messrs. Morrell or into court the sum of 2024*l.* 16*s.* 3*d.*, or any other sum, with or without interest, they, or their banking firm, would, on demand, in writing, of John Parker, his executors or administrators, pay to him the sum of 2000*l.* without deduction on any account, the understanding being that they should not deduct from or set up in answer to the demand of the sum of 2000*l.* any claim or set-off against the same in respect of any debt or liability which John Parker might, at the time of making such demand, owe to them, nor to resist payment of the sum of 2000*l.* on the ground that upon taking the accounts between them no sum of money or (if any) less than the sum of 2000*l.* might happen to be due to them from J. Parker, nor to resist or refuse payment of the sum of 2000*l.* on any other ground whatsoever. That John Parker subsequently delivered to Richard Wootten, the elder, a bag, saying, "It contains 81*l.*, and if you should have to pay the money to the Morrells, it will make up the sum;" but that upon the demand of John Parker, in writing, it was subsequently redelivered to him.

The lord chancellor subsequently reversed the decree made by Vice Chancellor Knight Bruce, and on the 10th of March, 1848, a fiat of bankruptcy was issued against John Parker, who was declared bankrupt.

The defendant, Richard Wootten, by his answer, said that he did not claim any right to hold the moneys otherwise than as a stakeholder in conjunction with his co-executor, and as being entitled to be indemnified against the costs incurred or to be incurred, whether in proceedings at law, which had been instituted by Messrs. Morrell against Messrs. Wootten for the recovery of the 2081*l.*, but which failed, or otherwise. That he was a salaried partner only with Richard Wootten the elder, deceased, who had appointed not only the defendant, but also William Cole, his executors, who both proved his will, and the sum of 2000*l.* was under their control, and not of this defendant alone, who was not entitled to any profits or capital in the said partnership between him and the said Richard Wootten the elder, deceased, and was indemnified by the said Richard Wootten the elder, deceased, against all losses, which indemnity he still held. That he and the said William Cole had in the possession of the solicitor of himself and the said W. Cole, the order for the bag con-

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taining or alleged to contain 81l., and a case submitted to counsel for his opinion, since the institution of this suit, and with reference thereto, and a case submitted to counsel with reference to the matters referred to in the said suit previously to the institution thereof, and his opinion thereon, and a document purporting to be a short-hand writer's notes of the evidence and summing up at the trial at law, and a bill of costs of Messrs. Walsh, and a bill of costs of Messrs. Nicholls & Doyle, relative to the matters aforesaid; but he submitted that he was not bound to produce the cases, or opinions, or bills of costs. That he had also in the possession of himself and the said William Cole the several particulars mentioned in the first division of the second schedule annexed thereto, which all related to the matters in the said bill mentioned, but which he was not bound to produce in the absence of the said William Cole. That the documents and papers mentioned in the second division of the said second schedule were in the possession of the solicitor of this defendant and the said William Cole, and related to the matters in the said bill mentioned, but which he was not bound to produce in the absence of the said William Cole. That the documents relative to the action at law, and the cases with the opinion of counsel thereon, and relative thereto, mentioned in the third division of the second schedule, were privileged, and ought not to be produced.

The schedules stated the several documents.

Mr. Shebbeare appeared in support of the motion.

Mr. Giffard, contra. This is an application against one of two executors; but it cannot be supported, as the documents are in the joint possession of Wootten and Cole, and Cole is not a party to the suit. This was held in *Murray v. Waller*, Cr. & Ph. 114.

The MASTER OF THE ROLLS. I do not think the admissions in the answer such that I can make an order to produce the documents.

SIMPSON v. CHAPMAN.¹

December 18, 1850.

Pleading — Answer — Insufficiency — Partnership.

A, B, & C carried on business in partnership as bankers. A died, having made B & D his executors, and S a residuary legatee. D was, after the death of A, admitted a partner in the business. A bill was filed by S against B and D for the administration of the estate of A. It stated that the executors had rendered imperfect accounts, particularly with reference to A's capital in the business at his death; that the business had, since A's death, been carried on with his capital, and that the residuary legatees were entitled to one third of the profits. It contained interrogatories, whether the business had not been carried on

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with A's capital — what were the profits since the death of A — what was the present capital — and what capital had been drawn out since A's death. C, the other partner, was not a party to the bill : —

Held, that in a suit so constituted, B and D were not bound to answer the above-mentioned interrogatories.

THOMAS SIMPSON, John Chapman, and Abel Chapman carried on business in partnership together as bankers. Thomas Simpson, by his will, dated the 20th of April, 1843, appointed the plaintiff one of his residuary legatees, and John Chapman, Henry Simpson, and Thomas B. Simpson his executors, and died in May, 1843, and his will was proved by all the executors.

After the death of the testator, the business of the bank was continued to be carried on, and Henry Simpson was admitted a partner in the concern.

The bill in this case was filed by the plaintiff, as residuary legatee of the testator, against John Chapman, Henry Simpson, and Thomas B. Simpson, the executors for the administration of the testator's estate.

The bill stated the old partnership of the testator and John Chapman and Abel Chapman; the will and the death of the testator; the admission of Henry Simpson as a partner, and some matters relating to the separate estate of the testator. The bill then stated, that the usual applications had been made to the executors, and "that the executors had rendered an account, but that such account was incomplete and imperfect, especially with reference to the testator's share and interest in the banking business, and the capital and effects thereof, and the mode in which the same had been dealt with; and that he had required a further account, which had been refused." The bill then charged, "that in fact the business had, since the said testator's death, been carried on by means of the capital which was therein at the time of his death, and that the plaintiff was entitled, if it should be for his benefit, to have the testator's estate credited with one third of the profits which had arisen from the said banking business since the said testator's death," with an option of taking the testator's share, at his death, and interest. The bill also charged, "that the assets of the partnership ought to be realized, and its debts and liabilities discharged, and the one third therein belonging to the said testator ascertained and paid, or, if it should be more for the plaintiff's benefit, that the said defendants ought to be charged with the value thereof at the death of the testator, and with interest thereon."

The bill then charged, that the defendants ought to set forth the matters which are the subject of the interrogatories hereafter stated. Among the interrogatories to the bill were the following: "Whether in fact the business in the said bill mentioned had not, since the death of the testator, been carried on by means of the capital which was therein at the time of his death, or some other, and what capital. What has been the amount of the profits of the said banking business in each and every year since the said testator's death? What is now the value of the capital thereof, or of the assets thereof, after deducting its liabilities? Whether the said defendants, John Chapman, and

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Henry Simpson, or Abel Chapman, have brought any capital into the said business since the said testator's death. That the defendants should set forth an account of all sums drawn out of the said banking business by the said John Chapman, Henry Simpson, and Abel Chapman, respectively, since the said testator's death."

Mr. Abel Chapman was not made a party to the bill.

The defendants having declined to answer the interrogatories before mentioned, exceptions were taken to their answer on those grounds, which now came on to be heard.

Mr. Malins and *Mr. J. V. Prior*, for the exceptions.

Mr. Roundell Palmer and *Mr. Cankrien*, for the defendants. The defendants are not bound to answer the interrogatories which are the subject of the exceptions. The information required by them can only be properly required for the purpose of having the accounts of the partnership taken; but the accounts of the partnership cannot be taken in the suit, as it is not framed for that purpose, and as one of the partners in it is not made a party. This is what is called a mere fishing bill as to these points. There are no definite allegations as to any of the matters inquired after in the interrogatories. There is not even any precise statement that the testator had any capital in the concern at his death. It may be, consistently with these allegations, that he had not any capital, and that all his interest in the business died with him. They cited, *Wigram on Discovery*, p. 165, 2d edit. *Rowe v. Teed*, 15 Ves. 378. *Somerville v. Mackay*, 16 Ibid. 384. *Adams v. Fisher*, 3 Myl. & Cr. 549; s. c. 7 Law J. Rep. (N. S.) Chanc. 289. *Lancaster v. Evors*, 1 Phill. 349; s. c. 13 Law J. Rep. (N. S.) Chanc. 269. *Francis v. Wigzell*, 1 Madd. 258. *Wedderburn v. Wedderburn*, 2 Keen, 722, 732, n.; s. c. 8 Law J. Rep. (N. S.) Chanc. 177. *Wood v. Hitchings*, 3 Beav. 504; s. c. 10 Law J. Rep. (N. S.) Chanc. 257. *Baron de Feucheres v. Dawes*, 5 Beav. 110; s. c. 11 Law J. Rep. (N. S.) Chanc. 394. *Way v. Bassett*, 5 Hare, 55; s. c. 15 Law J. Rep. (N. S.) Chanc. 1.

Mr. Malins, in reply, contended that the plaintiff was entitled to the information sought for, although it might not be made available in the suit. He was desirous of seeing how the account stood. Information would be supplied as to whether it would be for his advantage to take further proceedings or not, and so further expense might be spared.

KNIGHT BRUCE, V. C. The questions under consideration relate to the capital, profits, and the internal affairs of a banking partnership. They are put in a suit in which the accounts of that partnership cannot be taken, — and in a suit, moreover, to which one of the partners in that banking house is not a party. Now, I do not find it necessary to say that such a state of circumstances is of itself necessarily decisive against the right to put the questions, but thus much may, I think, safely be said, that, in such a state of circumstances, the court

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ought to require the questions, if capable of being put at all, to be put only where they are founded upon specific, pointed allegations of clear and unquestionable materiality. The allegations on this record are such as, in my judgment, to relieve me from deciding the general principle; and, considering the nature of the questions, and the nature of the record, the allegations are not so pointed, not so precise, not of such clear and unquestionable materiality, as to entitle the plaintiff to have them answered.

Exceptions overruled.

MARSDEN v. BLUNDELL.¹

December 13, 1850.

Practice — Affidavit of Service.

Decree taken against a defendant on an affidavit of service of the *subpœna* to hear judgment. The affidavit stated service on T., who, according to the belief of the deponent, was the defendant's solicitor:—

Held, that if it should appear on the record that T. was such solicitor, the affidavit would be sufficient.

THE decree in this case had been taken on an affidavit of service of the *subpœna* to hear judgment on one of the defendants. The affidavit stated that "the *subpœna* had been served on Messrs. Tyas & Co., who, according to the information and belief of the deponent, were the solicitors of the defendant."

An objection had been taken to the affidavit by the registrar, on the ground that it had not been stated with sufficient distinctness that Messrs. Tyas & Co. were the solicitors of the defendant in question.

Mr. Bates now mentioned the matter to the court. He stated that he had then an affidavit in the correct form, and asked that the decree might be made.

KNIGHT BRUCE, V. C., said that he could not act on the new affidavit, or make any other decree than that which had been pronounced, except by rehearing the cause. He could, however, consider the question of the sufficiency of the affidavit which had been produced at the hearing. Now, by the present practice of the court, the name of the solicitor of a defendant to a cause must appear on the record.² If, then, the registrar would look at the record, and should find that the

¹ 20 Law J. Rep. (n. s.) Chanc. 104.

² 17th order of the 26th of October, 1842. "That every solicitor of a party defending by a solicitor shall cause to be written upon every answer or pleading which he may leave with the clerk of records and writs to be filed, his name and place of business." Ord. Can. 213; 12 Law J. Rep. (n. s.) Chanc. 3.

 Lyne v. Pennell.

names of Messrs. Tyas & Co. were there as the defendant's solicitors, he thought that the affidavit would be sufficient, and that the decree might be taken upon it.

 LYNE v. PENNELL.¹

December 11, 1850.

Interpleader Suit — Supplemental Bill — Parties.

After a decree in an interpleader suit, one of the defendants, who was the official assignee in insolvency of another defendant, died, and a supplemental bill was filed by a third defendant alone, making the assignee subsequently appointed the sole defendant: —

Held; that the supplemental suit was properly constituted, and an objection for want of parties overruled.

ON the 25th of November, 1847, Sir H. Bruce filed his original bill against David E. Columbine and Amy his wife, Ann Columbine, A. L. E. Columbine, E. R. Clarke, R. Lyne, J. Penhall and G. Green, defendants, praying that the defendants might be decreed to interplead together, and settle and adjust their several claims and demands to and upon a certain annuity of 304*l.*; and that the plaintiff might be at liberty to pay the sum of 2196*l.* therein mentioned, the repurchase money of the said annuity, into court, for the benefit of the parties entitled thereto; and that the defendants might be restrained in the mean time from proceeding against the plaintiff in respect of the said annuity. The court made a decree, in pursuance of which the said sum was paid into court by the plaintiff Sir H. Bruce. A reference was subsequently ordered to the master to ascertain whether the said R. Lyne was entitled to any and what part of the sum so paid into court as aforesaid; and the master was also to inquire whether the defendants, J. Penhall and G. Green, the assignees in insolvency of D. E. Columbine, were entitled to the residue of the said sum in any and what proportions.

This was a supplemental suit by R. Lyne against W. Pennell, the sole defendant, and it stated that the master had completed the above inquiries, but before he had finally settled his report, and on the 23d of October, 1849, the defendant G. Green, the official assignee of the defendant, D. E. Columbine, died, and shortly after his death the defendant in this suit, W. Pennell, was duly appointed official assignee in the place of J. Green, jointly with J. Penhall. The bill prayed the usual supplemental decree against W. Pennell.

Mr. Rolt and *Mr. Prior* now objected, at the hearing, that the supplemental bill being filed by a defendant to the original bill, all the parties to the original bill were necessary parties to the supplemental suit. What had been done was to introduce a new actor on the

¹ 20 Law J. Rep. (n. s.) Chanc. 108.

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stage, and it was right that the parties should have an opportunity of judging whether he was a fit party or not.

Mr. J. Parker and *Mr. Dean*, contra, submitted that the case of *Biggall v. Atkins*, 6 Madd. 369, decided that the defendants need not be parties if they had no interest in the supplemental matter. All that was done was to substitute one official assignee for another. *Feary v. Stephenson*, 1 Beav. 42. The production of the certificate was proof of the appointment.

ROLFE, V. C. In an interpleader suit, as soon as the plaintiff has got a decree there is an end of him. I think, therefore, the defendants are in the anomalous situation of plaintiffs, as well as defendants; and that I may take a distinction between these and other suits, because, in truth, in an interpleader suit nobody is plaintiff. I should be unwilling to rest the decision upon any other consideration than this; but I think, for the reasons I have given, that I may make a precedent.

Objection for want of parties overruled.

MORGAN v. MORGAN.¹

December 16 and 17, 1850, and January 14, 1851.

Will — Construction — Marriage — Tenant for Life — Thellusson Act.

A testator, by will, directed his executors to pay to A 5000*l.* upon her marriage, with all the accumulations of interest thereon from the time of his death:—

Held, that the marriage of A was a condition precedent to the vesting of the legacy.

A testator gave a legacy to A, with the accumulations of interest from his death, upon a certain contingency, and gave the income of the residue of his estate to H for life, with remainders over. Some years after the death of the testator, it was ascertained that the contingency never could happen:—

Held, that H was entitled to the interest of the legacy from the death of the testator until that period.

A testator gave specific legacies of considerable value to the mother of B, and then gave to B a legacy of 5000*l.* upon her marriage, with the accumulations of interest from his death. More than twenty-one years elapsed after the death of the testator, and B still remained unmarried:—

Held, that the accumulation of interest after the expiration of twenty-one years was prohibited by the Thellusson act, and the case did not come within the exception contained in the 2d section.

Miss MORGAN, by her will, dated the 22d of May, 1825, made certain specific bequests, of considerable value, in favor of Mrs. Gyles, the mother of the legatees mentioned in the clause next stated. The

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will then proceeded as follows: "I appoint my brother, Thomas Morgan, and Francis Morgan, and my bankers, Sir Scrope B. Morland, Bart., and Sir George Bucket, Bart., my executors and trustees of all my money in the funds or elsewhere, to pay over to my sister Sarah Gyle's two daughters, Frances Sarah Gyles and Georgina Anna Gyles, 5000*l.* each upon their marriage, with all the accumulations of interest thereon from the time of my death. I give to my brother, Thomas Morgan, 1000*l.* India stock, standing in my name; and I give to my four executors in trust all the rest of my funded property or elsewhere, to pay my sister, Harriet Hanham, the dividends quarterly, independent of her husband, for her natural life, and, after her death, the whole to be equally divided between the grandchildren of my late father, James Morgan, to be made over to such as are of age when my sister Harriet dies, and the interest of the minors to be laid out in the 3*l.* per cents. until such time as they have attained the age of twenty-one."

The testatrix died on the 22d of May, 1825, the date of her will. At this time Mrs. Gyles was a widow, and both Frances Sarah and Georgina Anna were under age.

The executors set apart stock to answer the two legacies, and accumulated the dividends.

Harriet Hanham, the tenant for life, died on the 22d of February, 1838.

Georgina Anna Gyles died on the 12th of April, 1849, without ever having been married.

Frances Sarah Gyles was living, and had never been married.

The period of twenty-one years after the death of the testatrix expired on the 22d of May, 1846.

The bill in this case was filed by some of the residuary legatees of the testatrix against the trustees and the other parties mentioned in the will for the administration of her estate. The cause now came on to be heard.

The first question which was raised under the above circumstances was, whether the legacies of 5000*l.* and 5000*l.* had vested in Frances Sarah Gyles and Georgina Anna Gyles.

Mr. Russell and *Mr. Goldsmid*, for the plaintiffs, contended that the legacies had not vested, and, consequently, that the legacy of 5,000*l.* given to Georgina Anna Gyles and the accumulations had fallen into the residue on her death, and that the other legacy was still left contingent. They cited *Garbut v. Hilton*, 1 Atk. 381, where a legacy of 200*l.* was given to J. G. provided she married; and *Atkins v. Hiccoks*, Ibid. 500, where a legacy was given to a legatee to be paid at the time of her marriage; in both of which cases it was held that the marriage was a condition precedent to the vesting. They also cited *Batsford v. Kebbell*, 3 Ves. 363. *Vawdry v. Geddes*, 1 Russ. & Myl. 203; s. c. 8 Law J. Rep. Chanc. 63. *Taylor v. Bacon*, 8 Sim. 100. *Watson v. Hayes*, 5 Myl. & Cr. 125; s. c. 9 Law J. Rep. (N. S.) Chanc. 49.

Mr. Wigram and *Mr. Cotton*, for Frances Sarah Gyles, contended

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that the legacies had vested, and cited *Booth v. Booth*, 4 Ves. 399. *Branstrom v. Wilkinson*, 7 Ves. 421. *Saunders v. Vautier*, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N. S.) Chanc. 354. *Greet v. Greet*, 5 Beay. 123. *Vize v. Stoney*, 1 Dr. & War. 337.

Mr. Rolt, *Mr. R. Palmer*, *Mr. Wickens*, and *Mr. Fellows*, for other parties.

KNIGHT BRUCE, V. C. The testatrix had a right to say that the legatees should not take either interest or principal unless they married. I think that she has said so with sufficient plainness and sufficient distinctness. The language is the same as if she had said, "neither shall have any thing, unless she marries."

Upon this decision the second question was discussed, whether the estate of Harriet Hanham, the tenant for life, was entitled to the dividends of the stock set apart to answer the legacy of 5000*l.* given to Georgina Anna Gyles, accrued between the death of the testatrix and the death of the tenant for life; or whether the whole fund, principal and interest, went to the grandchildren, the residuary legatees in remainder.

Mr. Russell and *Mr. Goldsmid*, for the plaintiffs, contended that the stock set apart to answer this legacy was not residue producing income for the benefit of the tenant for life, and that the whole fund belonged to the legatees in remainder.

Mr. R. Palmer and *Mr. Fellows*, for the representatives of Harriet Hanham, the tenant for life, contended that her estate was entitled to the interest of the stock.

The following cases were cited on this point: *Crawley v. Crawley*, 7 Sim. 427; s. c. 4 Law J. Rep. (N. S.) Chanc. 265. *O'Neill v. Lucas*, 2 Keen, 313.

KNIGHT BRUCE, V. C. A testatrix gives contingent legacies, not without interest, but with interest—a gift both of principal and interest, to take effect on the happening of a future uncertain event. She does that, and there she leaves it. She gives the residue of her personal estate to a certain person for life, and, after the death of that person, to others. The executors set apart sums to answer the legacies, and accumulate the income. In a certain number of years the event becomes impossible, and the tenant for life dies. The question is, whether the tenant for life during a portion of the period of accumulation, is to lose all the income of the legacies thus appropriated for the purpose.

I think that it would be unjust to make the tenant for life suffer loss by having withdrawn from her that which, if matters could have been foreseen, would not have been withdrawn. Her estate must be compensated. She must have that substantially which she would have had if the event had been known to be impossible at the time of the death of the testatrix.

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The principle of my decision is, that Mrs. Hanham's estate must have all that she would have had if Miss Georgina Anna Gyles had died in the lifetime of the testatrix.

The third question was, whether the period of accumulation of the legacy given to Frances Sarah Gyles was to be taken to have terminated in 1846, the expiration of twenty-one years from the death of the testatrix, or whether such legacy was to be accumulated until the death or marriage of Frances Sarah Gyles.

Mr. Russell and *Mr. Goldsmid* contended that the accumulation was by the Thellusson act, 39 & 40 Geo. 3, c. 98, prohibited after 1846, the expiration of twenty-one years from the death of the testatrix; there being an implied direction to accumulate, which must be taken to have the same effect as an express direction.

Mr. Wigram and *Mr. Cotton*, for Frances Sarah Gyles, contended that, as there was no express direction to accumulate, the prohibitions of the act did not apply.

The following authorities were cited: *Shaw v. Rhodes*, 1 Myl. & Cr. 135. *M'Donald v. Bryce*, 2 Keen, 276; s. c. 7 Law J. Rep. (N. S.) Chanc. 173. *Elborne v. Goode*, 14 Sim. 165; s. c. 13 Law J. Rep. (N. S.) Chanc. 394.

KNIGHT BRUCE, V. C. Subject to the observation which I have to make hereafter, I think that this is within the act; because it is an inevitable result of what the testatrix has directed. The accumulations having proceeded up to the expiration of twenty-one years, the income of the fund, after twenty-one years, becomes a part of the residue until this lady's marriage or death. The observation to which I have alluded is this: may not the legacy in question be a portion within the meaning of the 2d section of the Thellusson act? I wish to call the attention of the counsel to this point, and to have it argued.

The case was argued as to this point on a subsequent day.

The 2d section of the Thellusson act is as follows: "That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise; or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed."

Mr. Russell and *Mr. Goldsmid* contended that the legacy in question was not a portion within the meaning of the act.

Mr. Wigram and *Mr. Cotton* contended that such a legacy was a portion.

The following cases were cited: *Shaw v. Rhodes*, 1 Myl. & Cr. 135;

Turner v. Turner.

s. c. in Dom. Proc. under the title of *Evans v. Hellier*, 5 Cl. & F. 114. *Beech v. Earl St. Vincent*, 19 Law J. Rep. (N. S.) Chanc. 130.

Knight Bruce, V. C., said, that, independently of the case of *Evans v. Hellier*, he should have thought that there was great doubt and difficulty on the point. One reason was, that what was given to the mother, Mrs. Gyles, consisted entirely of specific legacies, whereas her daughters were more general legatees. In addition to the difficulty thus created was the case of *Evans v. Hellier*. He could not venture to determine in favor of the validity of the bequest as to the accumulations, and must declare it to be affected by the act.

TURNER v. TURNER.¹

January 13, 1851.

Baron and Feme — Feme Covert — Decree on Consent of Baron and Feme — Application by her through a next Friend for Rehearing.

A decree was made establishing a will against a married woman as the heiress-at-law of the testator; she and her husband were defendants to the suit, and appeared by counsel, and consented. Upon a motion, by her next friend, she was allowed to present a petition of rehearing.

WILLIAM S. MERYWETHER and Mary Ann his wife were defendants to this suit, and appeared by one solicitor. On the 14th of February, 1833, a decree was made, on the consent of their counsel, establishing the will of the testator against her as his heiress-at-law. No settlement had been made upon Mrs. Merywether on her marriage, neither was she entitled by the will to any separate interest in the real estates of the testator.

Mr. Villiers, on behalf of Mrs. Merywether, who now appeared by her next friend, moved that she might be at liberty to present a petition of rehearing on the ground that the decree affected her interest in the testator's real estates; and because the joint consent, which had been given, was the consent of the husband, and was not binding upon the wife.

The MASTER OF THE ROLLS. I must allow her to present the petition of rehearing, leaving the effect of it for consideration.

¹ 20 Law J. Rep. (N. S.) Chanc. 112.

In re Frost's Trust.

In the Matter of FROST'S TRUST.¹

January 18, 1851.

Trustee Act, 1850 — New Trustees.

Petition for the appointment of new trustees and a vesting order under 13 & 14 Vict. c. 60. The trust fund was a sum of stock, and no representation had been taken out to the surviving trustee. The court refused to make the order.

THIS was a petition presented under the 13th & 14th Vict. c. 60, for the appointment of new trustees and an order for vesting the trust funds of such trustees.

The 32d section of the act is as follows: "And be it enacted, that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the court of chancery, it shall be lawful for the said court of chancery to make an order appointing a new trustee or new trustees, either in substitution for, or in addition to, any existing trustee or trustees."

By the 35th section it is enacted, "that it shall be lawful for the said court, upon making any order for appointing new trustees, either by the same or any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends of income thereof, subject to the trust, in the persons who upon the appointment shall be the trustees."

The trust fund was a sum in the 3l per cent. annuities. The surviving trustee, who had been resident in Ireland, died there, and administration with his will annexed had been taken out at Dublin. No administration, however, had been taken out in England.

Mr. Woodroffe, for the petition.

Knight Bruce, V. C., said, that there was here personal estate in England, and that there was a personal representative of the surviving trustee under an Irish administration, but no administration had been granted in England, and that the case, as to the property in question, was the same as if there had been no personal representative of the surviving trustee. In such a case an order for the appointment of new trustees could not have been made under Sir Edward Sugden's act. He thought that such a power was not given to the court by the language of the act which had been cited. He should make no order on the petition as it stood.

¹ 20 Law J. Rep. (n. s.) Chanc. 112.

 Willis v. Childs.

WILLIS v. CHILDE.¹

May 30, July 1, 2, 3, 8, and 12, 1850; and January 14, 1851.

Grammar School — Master — Removal — Charges — Right to be heard — Trustees' Discretion — Insufficiency of Cause — Jurisdiction — Injunction.

By a grant of King Edward VI., the college house in Ludlow, and divers estates, were vested in the bailiffs, burgesses, and commonalty (who under the municipal corporation act took the name of the mayor, aldermen, and burgesses) of the borough of Ludlow, to continue out of the rents issues and profits the grammar school in Ludlow, which was to be kept by one master and one usher. In 1838, the court of chancery appointed new trustees of the charity estates, and in 1848 a scheme was settled by the court for the management of the charity, and it provided "that the trustees should have authority from time to time, upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, &c., from their or his office. The trustees referred to the powers, and upon inquiry, and after several meetings, they passed a resolution to remove the master from his office, which they confirmed. Upon an application by the master to restrain the trustees from enforcing the resolution:—

Held, that the word "trust" in the scheme superadded to the word "power," was to keep in view that it was a trust, for the execution of which the court was providing.

That the word "trusts," especially when considered with reference to the direction to reserve the statement of the grounds of removal, had the effect of restricting the large meaning, which might otherwise be given to the word "discretion."

That the regulation did not confer upon the trustees an arbitrary power to dismiss the master upon any ground which they might deem just, free from any control of this court.

That the trustees are not the only and absolute judges of the sufficiency of the grounds of removal.

That the trustees, not having instituted any inquiry in the presence of the master, which might have afforded him the means of explanation and defence, the court, without determining the right or propriety of the conduct of the trustees, granted an injunction to restrain them from enforcing the resolution of removal.

KING EDWARD VI., by his charter, dated the 26th of April, in the sixth year of his reign, gave and granted to the bailiffs, burgesses, and commonalty of the town or borough of Ludlow, all that place called the College House, in Ludlow, in the county of Salop, with the appurtenances, with divers messuages, &c., thereto belonging, to hold the same to them and their successors forever, at the rent of 8*l.* 13*s.* 4*d.*, and directed that they should keep, observe, and continue the grammar school in the town of Ludlow, out of the rents and profits, for the educating, instituting, learning, and instruction of children and youths in grammar, from thenceforth forever, and that the school should be kept by one master and one usher; and it also directed provision to be made out of the issues and profits for thirty-three indigent persons within the borough, and for a rector and assistant.

At the time of passing the municipal corporation act, 5 & 6 Will. 4, c. 76, the estates of the charity were vested in the bailiffs, burgesses, and commonalty of the town or borough of Ludlow, but under sect. 6 of the same act they took the name of the mayor, aldermen, and burgesses of the borough of Ludlow.

On the 15th of November, 1837, the charity estates having become

¹ 30 Law J. Rep. (N. S.) Chanc. 113.

Willis v. Childs.

intermixed with those of the corporation, and having been demised for terms of thirty-one years, made renewable on payment of small fines, an information was filed by the attorney general against the mayor, aldermen, and burgesses of the borough of Ludlow, under which new trustees of the charity estates were appointed, — *In re the Ludlow Charities*, 3 Myl. & Cr. 262, — and they, in July, 1838, appointed the plaintiff, Arthur Willis, head master of the grammar school.

Two supplemental informations were subsequently filed; but terms of compromise were proposed, and these were subsequently carried out by 9 & 10 Vict. c. 18.

A scheme for the regulation of the charity was afterwards settled, which, as far as related to the grammar school, provided, "that the trustees shall, as often as occasion shall require, at some meeting or meetings to be convened and held as therein provided, and at which a majority at least of the existing trustees shall be present, elect a head master and usher for the school, being respectively members of the church of England, and such other masters, ushers, or lecturers, in the various branches of education as the trustees may think fit; provided that, for the purpose of obtaining an efficient master, usher, or additional master or masters, the trustees shall, two months at least previous to each election of a master, usher, or additional master or masters, advertise for candidates in such newspapers, and shall receive such testimonials of candidates as they may deem expedient. That the trustees shall have authority, from time to time, upon such grounds as they shall at their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, or any additional master or masters, or either of them, from their or his offices or office, in the manner hereinafter mentioned, (that is to say,) that on the requisition in writing signed by three of the trustees at least, the secretary of the said trustees shall call a meeting of the trustees, by notice in writing, given or sent to each of the said trustees six days before the holding of such meeting; and in such notice it shall be stated that at the said meeting it is intended to propose the removal from the said office of master usher, or additional master or masters, the person whose name shall be inserted in the said notice; and that at the same meeting there shall be present not less than two thirds of the trustees for the time being; and that at the said meeting a resolution shall be proposed by one and seconded by another of the said trustees for the removal of such master, usher, or additional master or masters; and that if the same be carried by at least two thirds of the trustees so present, the same shall be entered on the minutes of the said trustees, and signed by such of them as vote for the said resolution; and that if the said resolution shall at a subsequent meeting of the said trustees, called by such notice as last hereinbefore mentioned, and in which notice shall be set forth the former resolution, and that at an interval of one calendar month at least, whereat the same proportion of trustees at least shall be present as is required to be present at the first meeting, be confirmed by two thirds of the said trustees then present, the said master, usher, or additional master or masters shall be considered as removed as on the day

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of the said second meeting, and his office shall be vacant on and from that day ; provided that such resolution and the confirmation thereof as aforesaid, together with the grounds of such removal, shall be entered and preserved upon the minutes of proceedings of the said trustees. That the trustees shall fill up the vacancies in the offices of the master, usher, or additional master or masters, as soon as may be after any vacancies therein shall occur. That the schoolmaster shall reside in the school-house, and the trustees, on the office of schoolmaster and preacher ceasing to be vested in one and the same person, shall be at liberty to let the house belonging to the preacher, and receive and apply the rent as part of the income of the charity ; and in case it shall be more convenient to pay out of the funds of the charity a money payment to any preacher hereinafter to be elected, or to the present or any future assistant to the rector, sufficient to provide them respectively with a proper residence within the town of Ludlow, instead of providing a house for such residence, the trustees shall be at liberty so to do, with the consent of the preacher or the assistant of the rector, as the case may be. That the said trustees, at their general meetings, shall make such rules and orders for the government of the said school, and the schoolmaster and usher, and additional master or masters, and the almshouse or hospital, and the inmates thereof belonging to the said charity, as shall be expedient, and not inconsistent with the present scheme, or any future scheme to be decided by the court of chancery. And as to the school, that the master shall occupy the school-house with the school-room and premises hitherto occupied by him, with the appurtenances, free from rent and repairs, and from taxes and insurance, (except property and income tax,) all which rent and repairs, and taxes and insurance, (except property and income tax,) shall be paid by the trustees out of the income of the charity ; and the said master shall be at liberty, subject to such rules and regulations as the trustees may from time to time make, to take as boarders, for his own profit, not exceeding twenty-four, or such greater number as the trustees shall from time to time, by resolution at any general meeting or any meeting convened for that purpose, sanction, and to reside in the same house, the sons of any persons, to be educated with the other boys resorting to such school. That the school shall be open to all boys being the sons of persons, (either parents, or standing *in loco parentis*,) being inhabitants, or who at their decease were inhabitants within the town of Ludlow or ten miles thereof. That the number of boys shall, exclusive of boarders as aforesaid, be limited to such a number as the school-house will accommodate. And the master and usher, or one of them, shall be competent to teach, and shall teach at the school the Greek, Latin, and English languages, including history and geography, and also arithmetic, algebra and mathematics. That there shall be a uniform system adopted for the aforesaid branches of education of all the boys, including the boarders, without distinction ; and it shall be the duty of the master and the trustees of the said school to make such regulations for the due teaching of all the boys in the aforesaid different subjects of education, so that there may be

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no distinction with respect to the boys to be educated or the subjects to be taught. That no boy shall be admitted to the school under eight or when above sixteen years of age, and no boy shall remain at the school after eighteen years of age, unless when a boy shall complete his eighteenth year after the commencement of any current half year, in which case any such boy may remain at the said school until the expiration of such half year. That every boy now in the said school, or hereafter to be admitted thereto, shall, from the term of this scheme coming into operation, at the commencement of each half year of his continuance of the said school, pay in advance to the bankers of the trustees the sum of 1*l*. 10*s*. half yearly, and all sums so paid shall be carried by the bailiff and treasurer in the book of account, to be kept by him as aforesaid, to a separate account, to be called 'the education account.' That the sum of 1*l*. 10*s*. so to be paid half yearly by each boy shall be divisible as follows: the master of the school shall receive, in addition to his salary as master of the grammar school as hereinafter provided for, the sum of 9*s*. 6*d*. half yearly for each boy in the said school. The usher shall receive, in addition to his salary as usher as hereinafter provided for, the sum of 7*s*. 6*d*. half yearly for each boy in the said school who shall be under his tuition. A master to be provided by the said trustees for instructing the boys at the said school in writing, shall receive 4*s*. half yearly for each boy. A sum of 2*s*. in respect of each boy in the said school shall form a fund to be distributed by the trustees at midsummer or Christmas, in every year, in prizes of books to any boy educated at the said school, who shall be reported by the master of the school as deserving of such prizes, and the residue of the said half yearly payment of 1*l*. 10*s*. shall be retained by the trustees, to be by them applied or invested in manner hereinafter mentioned. That the writing master shall never receive a less annual salary than 20*l*., and in case the number of boys at any time at the school shall be insufficient, at the rate of 4*s*. half yearly each boy, to make up the salary to the annual sum of 20*l*., any such deficiency shall be made up to the writing master by the trustees out of any balance of the moneys from time to time standing to the education account, after providing for the several payments to the master of the school and the usher as aforesaid. That subject as last aforesaid the trustees shall out of the surplus moneys from time to time standing to the education account, be at liberty to provide for the salary or salaries for an additional master or additional masters, either to assist the master and usher in instructing the boys in the branches of education, to be taught by the master and usher as aforesaid, or to instruct the boys in the modern languages, or in all or any such other branches of learning as shall be considered by the trustees necessary or advisable: and any part of such surplus moneys which shall remain after providing for the salary or salaries of such additional master or masters as last aforesaid, as shall not from time to time be expended in providing such last-mentioned salary or salaries, shall be invested by the trustees in manner hereinbefore provided for with respect to the general funds of the charity, and such investments, with all accumulations

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of interest or dividends thereon, shall be carried to the credit of the education account. That there shall be no distinction whatever in the regulations of the school, or in the personal treatment by the master or usher or any additional master or masters towards any of the boys at the school, either during the school hours or out of the school hours. That the master shall be at liberty, for reasonable cause, to suspend any boy until the decision of the trustees can be obtained, for which immediate application shall be made; and the majority of the trustees present at any general or special meeting shall, for reasonable cause, have power to expel any boy from the school. That in case of the inability of the master, or usher, or any additional master or masters, to attend to the duties of the school, from illness or confinement, for a period of three months continuously, the trustees shall be at liberty, if they think fit, to appoint a deputy or substitute in his place during the further continuance, not exceeding, in the whole, twelve calendar months of such illness or confinement, and to make such order as they may think fit for applying any part of the salary of such master or usher or additional master or masters towards the remuneration of such deputy or substitute; and if, at the expiration of twelve calendar months' continuous absence, such master or usher or additional master or masters shall not be capable of resuming the regular discharge of his duties, the office of such master or usher or additional master or masters, as the case may be, shall thereupon become vacant. That in case any master or usher, becoming incapable from illness as last aforesaid, shall have filled the office for fifteen years or upwards prior thereto, or if, after a period of fifteen years' service, it shall be deemed by the trustees desirable, and for the benefit of the school, that an arrangement should be made with any master or usher, and with his consent, for retirement from his office, the trustees shall be at liberty, if they shall so think fit, out of any surplus funds belonging to the charity, which shall remain after answering the several specific purposes herein provided for, to grant and pay to any such master, incapacitated by illness, or consenting to retire, a life pension not exceeding 100*l.* per annum, and to any such usher, so incapacitated by illness, or consenting to retire, a life pension not exceeding 50*l.* per annum; provided that while any master or usher, to whom any such pension may have been granted, shall be living, the power, hereby given to the trustees of granting pensions, shall be suspended as regards any future master or usher, as the case may require, until such pension shall fall in, to the intent that only one pension may be payable to any master or usher respectively at one and the same time. As regards the exhibitions, that the trustees shall appoint an examiner to examine the school once in every year, at midsummer, and who shall be a member of the university of Oxford or Cambridge, and who shall be paid by the trustees for every such examination the sum of 10*l.* 10*s.* including his travelling expenses; and he shall make a report in writing, respecting the state of the school and the proficiency of the different classes in learning, and in respect of the qualifications of the candidates for the exhibitions, as hereinafter mentioned; and such

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report shall be delivered to the trustees, who shall deliver a copy thereof to the master and insert a copy thereof in the minutes, and deliver, or cause to be delivered, the original to the visitor. There shall be three exhibitions, at the university of Oxford, Cambridge, or Durham, of 50*l*. each, paid by the trustees out of the yearly revenues of the charity. In case there shall be amongst the boys educated at the school, other than the boarders, a candidate for such exhibitions of adequate proficiency and attainments, in the opinion of the examiner, and who shall in other respects be qualified, but not otherwise, one exhibition shall be appointed by the trustees yearly, at midsummer, to the boy whom the examiner shall find and report to be of the greatest proficiency and attainments amongst the said candidates, or by him reported to be qualified; or, in case of two or more such candidates being equal, the candidate who has been longest at the school shall have the preference. The exhibitions shall be open to all the boys at the school, not being boarders; but no boy shall be entitled to be elected to an exhibition who has not been educated as a day boy at the school for two years consecutively immediately before he shall be elected to such an exhibition; each exhibition shall be tenable for three years, unless any exhibitioner shall be expelled from or rusticated by the university at which he shall be a student, or shall omit or neglect to pass the regular university examinations at the proper times, except for causes to be approved of by the trustees, in which case any such exhibition shall, on the happening of any such event, cease to be payable, and the amount thereof, during any vacancy, shall fall into and form part of the contingency fund, as hereinafter provided for." The scheme then laid down various directions, and made provision for the regulation of the almshouses and hospital, and the income of the charity.

The trustees, after the filing of the information, underwent several changes, arising from deaths, and, loss of qualification from ceasing to reside within the district, and, at the time of filing this bill, consisted of Thomas Childs, Luttrell Lewin Clark, Edward Coates, Joshua Cooper, George Henry Dansey, William Felton, William Harding, Richard Jones, Richard Marston; John Phillips, Horatio Russell, Humphry Salwey, John Sawyer, John Smith, William Tinson, George Wellings, and Henry Whittall.

The bill then stated that some of the trustees were holders of the renewable leases, and that others were members of the corporation, and that the compromise was less favorable to them and the corporation than the terms originally proposed, and that they were displeased with the plaintiff for his exertions in favor of the charity, as the incomes of the property of the corporation had become exhausted in indemnifying the charity, and because the expenses of the corporation had to be met by a borough rate.

The bill also stated that the trustees were annoyed by the plaintiff's interfering to prevent the sale of a part of the charity property, called the Ashford estate, under the impression that it was about to be sold at an undervalue, and that he wrote to the bishop of Hereford to withhold his consent and allow him to be heard as an object of the charity.

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It was then stated that the trustees had concocted a plan to remove him from his office of master.

That on the 7th of May, 1849, John Phillips, George Wellings, Luttrell Lewin Clark, Horatio Russell, Humphry Salwey, George Henry Dansey, and Henry Whittall were appointed a committee for preparing rules and ordinances for the government of the grammar school, and schoolmaster and usher, and additional masters or master of the hospital or almshouses, and inhabitants thereof, and that Richard Marston and William Tinson were afterwards added to the committee. That on the 6th of August, 1849, at another quarterly meeting of the trustees, and without any communication with the plaintiff, it was "Resolved, that every complaint or observation which either the master or the usher of the free grammar school consider necessary to be addressed one to the other touching in any manner the discipline, order, or conduct of the school, shall in no case be made in the presence or hearing of any scholar. That this resolution be a provisional rule for the government of the school, pending the completion of the general rules. Resolved and ordered, that the play-ground attached to the school-room be thrown open to all the boys half an hour at least before the school commences in the morning, and be kept open for the use of the boys until the school closes in the evening; and that this resolution be a provisional rule for the government of the school, pending the completion of the general rules."

A copy of these resolutions was sent to the plaintiff; and he, on the 8th of August, 1849, wrote to the trustees, submitting that the resolutions of the 6th of August involved matters of discipline not within the scope of the rules and orders contemplated by the scheme, but rather within the province of the plaintiff as head master than of the defendants as trustees; and in the same letter, the plaintiff preferred a complaint against the usher of the school for incompetency and neglect of duty, in absenting himself from the school and taking no interest in the improvement of the pupils committed to his charge.

On the 15th of August, the plaintiff had returned to him a work on endowed grammar schools, which he had lent to the trustees, accompanied by a copy of resolutions which had been passed by them at an adjourned meeting held the day before, and which were as follows: "Then the clerk read a letter from the Rev. Mr. Willis, the master of the school, dated the 8th of August inst., and also a letter from Mr. Williams, the usher, dated the 4th of August instant. It was ordered that the clerk do request the gentlemen severally to report officially each particular complaint which he alleges against the other, but that such report must be strictly confined to matters of discipline and conduct, as the trustees cannot recognize the principle that any of their officers can originate or deal with questions touching the competency of persons filling offices under them." It was further ordered, that with reference to that portion of the master's letter relating to the order of the trustees directing the play-ground and school-room to be open to all the boys without distinc-

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tion, the clerk be directed to request the master to state specifically whether he intends such letter to be considered by the trustees as a refusal on his part to comply with such order. It was further ordered, that the clerk do inform the master that the trustees will be happy to receive from him his opinions and suggestions for the formation of rules and regulations for the due teaching of all the boys as directed by the twenty-third clause of the scheme. It was further ordered, that Mr. Charles Ford Walker be appointed writing master to the grammar school.

At a quarterly meeting of the trustees, held the 5th of November, 1849, and continued by adjournment to the 21st of November, 1849, the following entries were made upon the minutes: "The clerk reported that five boys only in the grammar school had paid the head-money as directed by the scheme, and he read a letter which he had written to the master of the grammar school on the subject of the 16th of August last. Resolved and ordered, that for the purpose of enforcing compliance with the above clause in the scheme, the master be required to close the school immediately against such boys now in the school as have not already, or do not forthwith produce a certificate of having paid the head-money, or that he do account to the trustees for the head-money for such boys as have not already paid the same. Resolved and ordered, that the whole question at issue relative to the grammar school be specifically referred to the grammar school committee, with instructions to report thereon immediately." The following was the letter referred to in the minutes:—

"Ludlow, August 16, 1849.

"Sir,—It has been suggested that you should require a certificate of this kind from all boys coming to the school. I am, &c., Rodney Anderson."

"Ludlow, August, 1849.

"No 1.—Received of James Davenport Jones 1*l*. 10*s*., on education account for half year's instruction in grammar school, ending Christmas, 1849, as directed by clause 25, in the scheme for the management of the school.—1*l*. 10*s*. Rodney Anderson, clerk to the trustees."

On the 3d of January, 1850, a special meeting of the trustees was convened by notice, under the hands of three of the trustees, to receive the report of the school committee, and the report and the proceedings were entered on the minutes, as follows: "The committee having been informed that the master of the school persists in refusing to observe the rules and orders of the trustees of the 6th of August last, in regard to the use by the town boys of the school-room and play-ground attached thereto, thought it advisable to investigate the alleged facts, and after due inquiry they have considered it their duty to report to the general body of the trustees the following facts: That the school-room and play-ground attached have been and are still closed against the town boys, in violation of the orders of the trustees made the 6th of August last. That the town boys who are waiting in the public street for the opening of the school

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doors were on a recent occasion reprimanded and punished by the master for waiting there, the school-room at that time, although closed to the town boys, being open to the use of the boarders; that the differences between the master and the usher continue unabated, much to the injury of the school; that a special meeting of the trustees be convened for the 3d of January, for the purpose of receiving the report. It was ordered that the same be received and entered on the proceedings. It was the unanimous opinion of the meeting, that a special meeting of the trustees should be forthwith convened under the scheme for regulating this charity."

On the 16th of January, 1850, a special meeting of the trustees was convened, by notice, stating that at such meeting it was intended to propose the removal of the plaintiff from the office of master of the grammar school; and at such meeting, upon its being proposed and seconded, the trustees present passed a resolution that the plaintiff be removed from the office of master of the grammar school; the grounds for which were entered upon the minutes, and stated that the several previous rules and orders made by the trustees had been read, and also the minutes of their previous proceedings: and upon its being proposed and seconded, it was resolved, "That the Rev. Arthur Willis be removed from the office of master of the grammar school of King Edward VI., in the borough of Ludlow." In testimony whereof, it was signed by fourteen of the trustees, being at least two thirds of those present.

The grounds for removal entered for preservation upon the minutes in pursuance of another resolution were as follows: "First, because Arthur Willis has continued from the making of the rule or order of the 6th of August, 1849, to disobey the same, and has excluded the town boys from both the school-room and the play-ground attached to the said school-room, whilst the scholars, boarders in his house, had access to both, thus making distinctions in the personal treatment of the scholars. Second, because the said Arthur Willis, by refusing to open the school doors at a proper time before school hours, compels the boys to await the opening of the doors in the public streets, whereby they are exposed to the weather both in summer and winter, without any kind of shelter, and this becomes highly dangerous to the health of children of tender years, who thus in bad weather are compelled at different periods of each day to go into school and remain there in wet clothing. Third, because whilst the town boys have been punished if not in school at the appointed hours, they have also been punished for awaiting in the public street opposite the school-house the opening of the school doors, whilst from the fact that the school clock, which has not a dial, and the two public clocks at the church and at the market-cross rarely or never give similar time, it is imposing almost an impossibility upon the town boys to present themselves at the school door precisely at the time of its being opened and none other, whereas had the said master obeyed the aforesaid order of the trustees, he would have dealt not only justly by the town boys, but have insured proper means to secure a punctual attendance, as the town boys could have awaited their sum-

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mons, either in the play-ground or the school-room. Fourth, because the said Arthur Willis has impaired the usefulness of the usher, by blaming him openly before the boys and by other proceedings. Fifth, because we believe that under the mastership of the said Arthur Willis the school cannot be recovered from its present decayed condition, and the proper benefit of a valuable foundation will be in a great degree lost to the community. Sixth, because the aforesaid refusal to comply with our said rule and order is an infringement not only of such order, but also of the scheme laid down by the court of chancery, and as he has already endeavored to intimidate the trustees by a threat, it takes from them all hope that the general rules for the government of the school now under consideration can ever, under the mastership of the said Arthur Willis, be brought into effectual operation, if they shall be personally distasteful to himself or inconsistent to his interests."

The bill then stated that, until after the resolution was come to, the plaintiff was not made acquainted with any of the grounds of removal mentioned; that no investigation of the charges ever took place in the presence or with the privy of the plaintiff; and that no evidence was ever taken in his presence in relation to the grounds of removal, but that the resolution was come to without the plaintiff having any opportunity of answering the charges; and on the 18th of February, 1850, he wrote to the trustees, stating that he was surprised at the charges against him, and at the intimation of a determination to remove him from the office of master; that as no opportunity had yet been offered to him of answering the charges, he trusted they would give their calm and attentive consideration to what he had then to state on the subject of them, and that, before proceeding further in the matter, they would afford him an opportunity of establishing the truth of the statements contained in the letter. He then went through the several charges, explaining them, and concluded by expressing his interest for the grammar school.

At twelve o'clock at noon, on the 20th of February, 1850, the plaintiff received an intimation from the trustees that they were willing to hear what he had to say upon the subject of his letter of the 18th of February, 1850.

On the same 20th of February, 1850, a meeting of the trustees took place. The plaintiff attended with the usher, and they were examined by the trustees, but no further evidence was gone into, and the trustees confirmed the resolution passed on the 16th of January, 1850, and the following minute was entered upon the book: "Then the Rev. A. Willis, the master of the grammar school, and Mr. John Williams, the usher, severally attended, and were heard." And after setting out the resolution of the 16th of January, 1850, it stated, "And we do hereby remove him from such office." This was signed by fourteen of the trustees, being two thirds of those present, and was confirmed by them; and it was ordered that a copy of the resolution and of the grounds of removal should be forwarded to the plaintiff; and with a view to carry it into effect, they subsequently caused him to be served with a copy of a declaration in ejectment, to recover pos-

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session of the school-house and school-room and other premises occupied by him as master.

The bill then charged that the trustees, since passing the resolution, had refused to recognize him as master, and that they had directed the usher and the scholars not to recognize or obey him.

It also charged severally that the facts stated in the grounds for removal were not true; that though he might have alluded to the inattention of the usher in the presence of some of the boys previous to the 6th of August, 1849, yet that he had never done so since openly in their presence.

It also charged the usher with neglect, and of telling the plaintiff that he did not consider himself amenable to him, but responsible to the trustees only.

It also charged that the school was not impaired, and referred to the examiner's report, stating that the effective discipline, moral education, and the accurate knowledge in the several branches of learning imparted to the boys, formed a certain criterion of the schoolmaster's discharge of his duties.

It also charged that certain of the trustees had said it was necessary to *get rid* of the plaintiff, as he interfered with the trustees; that they had endeavored to get up charges against him, and accused him of having caused an increase in the borough rates.

It also charged that some of the trustees had admitted that others of them who voted on the 16th of January were ignorant of the charges preferred against the plaintiff, and that others had come to the meeting with a determination long previously formed to remove the plaintiff from his office of master. It then prayed that the resolution of the 16th of January, 1850, removing him from his office, might be declared invalid and not binding on the plaintiff, and that the defendants might be restrained from doing any act or taking any steps or proceedings for the purpose of carrying into effect or enforcing the resolution of the 16th of January, 1850, and from continuing or taking any further proceedings in the action of ejectment, or taking or commencing any further or other proceedings at law against the plaintiff to obtain possession of the school-house and other premises occupied by the plaintiff as master of the school.

The plaintiff now moved for an injunction in the terms prayed by his bill, and several affidavits were filed in support of the application.

The defendants, in their affidavits, generally denied the allegations and charges in the bill; and in an affidavit made collectively they denied having formed any corrupt plan to oust the master from his office, or that the resolution of the 16th of January, 1850, was come to in consequence of such determination. They said that they had caused investigations to be made of the charges, and believed them to be true. They also said that the charges had been investigated by them prior to the 16th of January, 1850, when they received evidence with reference to them, and that they were again investigated on the 20th February, 1850, in the presence of the plaintiff. They also said that the whole circumstances had been fully discussed and were known to the trustees.

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Mr. Turner and *Mr. Renshaw*, for the plaintiff. The defendants are trustees of property for charitable purposes, and among others there is a trust for a schoolmaster. In their capacity of trustees they have the power of nominating and dismissing the master. This court will compel them to exercise the power of nominating the master, as they have the estates vested in them dedicated to those especial purposes, and though it will not control them in the exercise of those powers, yet it will at the same time take care that they are duly exercised, and that they are not exercised corruptly or improperly. It will also take care that there is no abuse of the discretion vested in them — *Dummer v. The Corporation of Chippenham*, 14 Ves. 245; and, pending proceedings against the trustees relating to the exercise of the powers, the court will restrain them either from depriving the master of his office, or in any way enforcing the resolution. Were there no jurisdiction in this court to control trustees of charities, especially of those attached to corporations, they would be able to elude entirely the purposes for which they were appointed trustees, and misapply the revenues of the estates. The plaintiff also has never been allowed an opportunity of refuting the charges made against him. *In re Phillips' Charity ex parte Newman*, 9 Jur. 959. *In re Fremington School ex parte Ward*, 10 Jur. 512.

Mr. Lloyd and *Mr. Lewin*, contra. This is not a case in which an application for a special injunction will be entertained. The plaintiff has already obtained the common injunction, and he must make out such a case as will induce the court to extend it. The bill states that the trustees had formed a corrupt plan and determination to oust the plaintiff of his office of master. It also casts some indefinite imputations upon them respecting the sale of the Ashford estate, and it charges them with hostility on that and other grounds. No evidence of irregularity in the proceedings of the trustees can support such allegations. *Gibson v. D'Este*, 2 You. & C. C. C. 542; 1 House of Lords Cases, 605. *Glascott v. Lang*, 2 Phil. 310; s. c. 16 Law J. Rep. (n. s.) Chanc. 429. *Ferraby v. Hobson*, 2 Phil. 255; s. c. 16 Law J. Rep. (n. s.) Chanc. 499. The plaintiff was present when the resolution removing him was confirmed absolute: he had then been heard, and, in substance, admitted the charges, but, on the 16th of January, it does not seem that he was present, but evidence upon all the facts was gone into, and many of the facts were admitted by the plaintiff. In exercising their powers the trustees had all the authority formerly vested in the corporation, and they were bound to look to the charter founding the school with reference to which the scheme made in this court must be considered. *The Attorney General v. The Corporation of Ludlow*, 2 Phil. 685.

[THE MASTER OF THE ROLLS. I think the case must be governed by what is found in the scheme. The defendants also must be considered as having acted under the powers in the scheme.]

Mr. Lloyd. But a court of equity never extends visitatorial powers, neither will it establish a charity when a charter has been granted;

that alone must be the guide for the regulation of the charity, or it must be left to the rules of law. *The Attorney General v. Middleton*, 2 Ves. sen. 327. And if there is no visitor appointed of a royal endowment, the crown, as visitor by implication, may issue a commission of inspection if complaint is made of the conduct of the governors. *Eden v. Foster*, 2 P. Wms. 325. Here the trustees are invested with such powers of removal as they shall in their discretion deem just. But if the allegations in this bill are true, the trustees ought to be immediately dismissed. There was, throughout, an inclination of the plaintiff to thwart all the proposals of the trustees; the play-ground was not the freehold of the plaintiff, it was vested in him for the benefit of those resorting to the school for education. But the plaintiff, without any direct refusal to obey the order of the trustees directing the school-room and play-ground to be kept open, evaded it, and knowingly connived at the infringement of the order. The trustees had gone into evidence on that point, and they were satisfied of the fact. The plaintiff does not complain of surprise, or say that he was not aware of the charges prior to the 16th of January, 1850. The plaintiff knew that a meeting was convened to confirm the resolution of the 16th of January, and he asked for an opportunity of establishing the statements made by him in his letter; it was evident, therefore, that he did not then think that the matter was prejudiced by hostility or any corrupt concert: he wrote his explanations, and did not say that he had any evidence to offer; the trustees might well, therefore, suppose that the method of complying with the request was left open to their discretion. The plaintiff, by attending the meeting on the 20th of February, waived all objections prior to the 16th of January. He might, had he chosen, have either protested against the proceedings of the 16th of January, on the ground that he had not been heard, or he might have asked the trustees to adjourn the meeting and appoint a time to take his evidence. The trustees, however, adopted the course pointed out by the plaintiff's letter. They had gone into evidence upon the charges, and then, having heard him and the usher, they took the letter into consideration; nothing more was requisite; the question had been reduced to the locking of the door. The plaintiff did not then ask for any adjournment, he did not say he was unprepared, or taken unawares; the trustees, therefore, were justified in considering themselves acting as a deliberative body, and in the manner they were called upon to act by the plaintiff's letter; the scheme itself did not impose upon the trustees any obligation to register the grounds of charge until the resolution of removal was confirmed, and the object in stating them was not for the purpose of limiting the discretion of the trustees, or giving any court power to investigate them, but merely with a view to protect charity against a fraudulent exercise of discretion. The trustees did not take any evidence of the decay of the school, which was formerly confined to the town of Ludlow. The plaintiff admitted that the number had decreased, though the scheme had extended the circuit for ten miles round, and three exhibitions had been founded; still the school, that numbered formerly upwards of

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seventy boys, numbered now only twenty-three, including the plaintiff's boarders. *Philips v. Bury*, 1 Ld. Raym. 5; s. c. 2 Term Rep. 346. *The Queen v. The Corporation of Ipswich*, 2 Ld. Raym. 1232-1240. *St. John's College v. Tbdington*, 1 Burr. 158, 199; s. c. 1 Kenyon, 441. *The King v. The Bishop of Ely*, 2 Term Rep. 290; s. c. 5 Term Rep. 475. *The Queen v. The Darlington School*, 6 Q. B. Rep. 682; s. c. 14 Law J. Rep. (N. S.) Q. B. 67. *Whiston v. The Dean and Chapter of Rochester*, 7 Hare, 532; s. c. 18 Law J. Rep. (N. S.) Chanc. 473. *In re Buxton School, ex parte Holland*, 11 Jur. 581. *Bagg's Case*, 11 Rep. 93 b, 98 b. *In the matter of the Ludlow Charities, Mr. Lechmere Charlton's Case*, 2 Myl. & Cr. 316; s. c. 6 Law J. Rep. (N. S.) Chanc. 185. *In re Phillips' Charity*, 9 Jur. 959. *The King v. Gaskin*, 8 Term Rep. 209. *Doe d. Earl Thanet v. Gartham*, 1 Bing. 357; s. c. 8 B. Moo. 368; 2 Law J. Rep. C. P. 17.

Mr. Turner, in reply. The complaint is not that there has been a corrupt exercise of discretion by the trustees, but that it has been exercised not in accordance with the authority vested in them as trustees. But if fraud is imputed, and there are other matters alleged in the bill, which will give the court jurisdiction as the foundation of the decree, then the course is to dismiss so much of the bill as is not proved, and to give such relief as under the circumstances the plaintiff may be entitled to. *Archbold v. The Commissioners of Charitable Bequests for Ireland*, 2 House of Lords Cases, 440.

January 14, 1851. The MASTER OF THE ROLLS. The plaintiff complains of his removal from his office of master. He admits that the trustees of the charity, if the act in the due exercise and execution of the powers and trusts reposed in them, and in the manner authorized by the regulation, have a right to remove the schoolmaster, and that they have even a discretionary power, when it is exercised after due consideration, and after making themselves duly acquainted with the facts upon which they act. But he denies that they have any right to use the master arbitrarily and capriciously, and he insists that in his case they have acted irregularly, without proper inquiry, and unjustly, and that they have done him an injury for which he is entitled to redress in this court.

The trustees, on the other hand, insist that they have a right to remove the master for any reasons whatever which seem good to themselves; that they are not answerable to this court for the mode in which they have thought fit to exercise their discretion; and they further contend that if they are bound to answer, or are in any way accountable for the exercise of their discretion, they are ready to show they have proceeded regularly and justly, and have removed the master for good and sufficient reasons.

The first, and perhaps the only question material to be considered at this time is, whether, under the scheme established in this case, the trustees have an arbitrary and uncontrollable authority to dismiss the master for any cause they may think fit to assign. It is contended,

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on their behalf, that the decision is final, and subject to no appeal. As an authority for this, *The Queen v. Darlington School* is relied upon. In that case there was power for the governors to remove the master and appoint another "according to their sound discretion," and upon those words it was held that the trustees might remove the master as they pleased, and that their discretion was not to be restricted by any opinion which the court might form of the reasons on which they might have been induced to exceed it. When *The Queen v. Darlington School* was brought under the notice of his honor the Vice Chancellor Knight Bruce, in *In re The Fremington School ex parte Ward*, he did not consider that it applied.

In that case, by the will of the founder, the trustees were empowered to displace the master "upon any neglect or misbehavior in such master, or other just cause, for which they, or the greater number of them, should agree upon and think fit to displace such master, and place another master there." His honor did not think the principles on which *The Queen v. Darlington School* was decided were applicable to such a case as that; but held, that the court was to consider whether there was neglect, misbehavior, or other just cause. It was not enough for them to say that there was some cause, or some reason, which they might agree upon and think fit to displace the master. In the case now under consideration, the power of the trustees is not, as in *The Queen v. Darlington School*, "to remove according to their sound discretion," or, as in *In re The Fremington School ex parte Ward*, "for such just cause as they might agree upon and think fit to displace him;" but the power has reference to "such grounds as they shall in their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just." If the grounds were to be such "as they, in their discretion, should deem just," without more, or if they were merely to exercise the power, it might be difficult to distinguish this from *The Queen v. Darlington School*; but here, that which is to be done is to be in the execution, not merely of the powers, but of the powers and trusts reposed in them. The powers which are given in such a case as this, like all powers to be exercised for the benefit of others, or for purposes which are more or less public, must in one sense be deemed to be held in trust.

There are, indeed, very many powers in that sense held to be trusts which cannot be enforced or controlled in this court. But here is a power defined by this court itself for the purpose of carrying into execution a charitable trust, and it must, I think, be considered, that the word "trusts" was added to the word "powers" for some purpose, that is for the purpose of keeping in view that it was a trust, for the execution of which the court was providing, and the employment of the word "trusts," especially when considered with reference to the direction to preserve the statement of the grounds of removal, appears to me to have the effect of restricting the large meaning which might otherwise be given to the word "discretion," contained in the ordering part of the clause. And I am of opinion that the regulation does not confer upon the trustees an arbitrary power to dismiss the master

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upon any ground which they may deem just, free from any control of this court.

Considering that the trustees are not the only and absolute judges of the sufficiency of the grounds of removal upon which they have acted, and that they are subject to the jurisdiction and control of this court in the execution of the trusts reposed in them, it becomes necessary to inquire into the manner in which they have acted in the present case. The plaintiff alleges that the power of the trustees has been corruptly exercised, or, at least, that there has been an undue exercise of the discretion which they had. A great many affidavits have been filed; they contain much inconsistent evidence, and, it seems to me, that some, at least, of the trustees manifested an eager desire to find occasion to remove the plaintiff. If, upon a fair investigation of the facts, and after just means of explanation and defence had been afforded, it had appeared that the employment of the plaintiff has become prejudicial to the school, the trustees would have been fully justified in removing him. On the merits, however, I find it very difficult to form a conclusive opinion of the truth or falsehood of many of the allegations which are stated. But after reading the affidavits, I observe that some differences having arisen between the master and the usher, the trustees, not troubling themselves to promote any means of conciliation or adjustment, seem to have been disposed to impute the principal fault to the plaintiff, and instead of instituting an inquiry in his presence, which might have afforded him the means of explanation and defence, they, without his knowledge, commenced proceedings against him, by referring the matter to the school committee, to consider the case. The school committee proceeded to investigate the case in his absence, without his knowledge, and reported against him. The report was not communicated to him; but the trustees met, and, as they say, considered the report, and in his absence, and without hearing him, they confirmed the report, and resolved to remove him, and stated the grounds and reasons for such his removal.

The trustees having thus committed themselves, without hearing the party affected by their resolution, — having thus condemned the plaintiff unheard, — ordered another meeting to be summoned for Wednesday, the 20th of February, then next, at eleven o'clock in the forenoon, for the purpose of submitting the foregoing resolution for confirmation. The trustees did not even then think it necessary to communicate the proceedings to the plaintiff; but the plaintiff having by some means, not, I think, explained, become acquainted with the proceedings on the 18th of February, two days before the appointed meeting for the 20th, wrote to the trustees a letter, which ought, I think, to have induced them to pause, and to consider whether they were proceeding with due caution, and justly. The only effect which it seems to have had upon them was to induce them, at twelve o'clock on the day of the meeting, to inform him that they had received his letter, and were ready to hear what he had to say upon the subject of it. He did, accordingly, attend, and said what he could or thought of under such circumstances, and after so hearing him, asking him, I

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think, whether he had any thing further to say, and receiving an answer (which might well be) that he had not, — under these circumstances, and without any other hearing or inquiry, in his presence, — they confirmed the former resolution to remove him, and this confirmation was signed by the same fourteen trustees who had signed the resolution of January, and so previously committed themselves to the conclusion and to the reasons. Care was taken to observe the mere forms required by the scheme on these occasions. I own it appears to me perfectly clear that Mr. Willis had no proper opportunity afforded him of defending himself, no sufficient means of explanation, no means of proving his defence, if he had any. The evidence which is before me does not enable me to determine whether Mr. Willis had a good defence or not, and it is a most serious misfortune to the welfare of this school that a matter of such importance should remain in suspense.

I think, upon their own showing, the trustees have taken upon themselves to remove Mr. Willis, without giving him a proper hearing, and the facts which are disclosed in the affidavits, though not such as to enable me to come to a satisfactory conclusion, are at least such as to make it not improbable that Mr. Willis may be able to show that he ought not to have been removed. Therefore, I am of opinion, that the injunction must be granted to restrain the defendants from enforcing the resolution of the 16th of January, confirmed on the 20th of February. I wish only to add, that I do not mean to say any thing that can really determine the right or propriety of conduct between these parties; and, although I think they are not entitled to proceed upon the footing of this resolution, I do not mean to insinuate in any way that they are not entitled to have a proper investigation into these or any other grounds of removal, and proceed in a just manner upon them.¹

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and *in re THE WINDING-UP ACTS, 1848 AND 1849, ex parte JANE*
*GOUTHWAITE.*²

December 19, 1850, and January 11 and 13, 1851.

Contributory — Executrix — Banking Act, 7 Geo. 4, c. 46, s. 13.

An original shareholder in a joint-stock banking company died possessed of shares, and his executrix produced the probate of his will, and received the dividends regularly for four years as executrix of the deceased shareholder; but the requisite forms for becoming a member of the company in her own right had not been complied with. By the deed establishing the company it was provided, that each shareholder should be entitled to the profits and subject to the losses in proportion to his shares; and it was covenanted that each shareholder, his heirs, executors, &c., should, in respect of shares remaining part of the assets of the covenantors, observe the covenants and stipulations in respect of such shares so remaining part of his assets. The master struck out the name of the executrix from the list of contributories, upon the ground, that, more than three years having expired

¹ See the report of a decision in this case, vol. 20, Exch. p. 85.

² 15 Jur. 137.

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since the death of the shareholder, his estate was not liable, being of opinion that sect. 18 of stat. 7, Geo. 4, c. 46, applied to contribution between partners, as well as to claims by creditors. Knight Bruce, V. C., was of a different opinion, and referred it back to the master, with a declaration, that, either in her own right, or as executrix of the deceased shareholder, she ought to be on the list of contributories:—

Held, first, that the limitation of three years contained in the 7 Geo. 4, c. 46, s. 13, applied to claims by creditors only, and not to claims for contribution as between the partners *inter se*.

Secondly, that upon the construction of the deed, in the absence of any proof that the executrix had done any thing which could have the effect of constituting her a member in her own right, she ought to be on the list of contributories in her representative character.

Thirdly, that the order of the vice chancellor was right in form as well as in principle.

THIS was a motion by way of appeal from an order of his honor, Knight Bruce, V. C., dated the 17th July, 1850, whereby it was referred back to the master to review his decision excluding Jane Gouthwaite from the list of contributories of the above company, with a declaration that the said Jane Gouthwaite ought to be included in the list of contributories of the said company, *either in her own right, or as executrix of George Gouthwaite, deceased*, (reported 14 Jur. 1010.) The facts of the case were admitted on both sides to be as follows: George Gouthwaite died in the year 1842, possessed of eighty shares in the North of England Joint-stock Banking Company, fifty of which were originally allotted to him, twenty shares were purchased by him, and ten shares were allotted to him under the deed of settlement in respect of the former shares; he received the dividends on them before his death, and appointed his wife, Jane Gouthwaite, executrix of his will. She duly proved the will on the 9th June, 1842. On the 6th August, 1842, this probate was exhibited at the bank. The shares were never sold or transferred by the executrix, nor was any notice given to the bank, under the 29th clause of the deed of copartnership, of the desire of the said executrix to take the said shares, or any of them; nor did she attend any meeting of the said banking company. From the time of the said George Gouthwaite's death, down to the stoppage of the bank, the dividends declared since his death were regularly paid to the said Jane Gouthwaite, who signed the receipts for the same, the first dividend warrant for which was dated the 15th March, 1843, and signed "Jane Gouthwaite" simply; and all the subsequent warrants, of which there were seven, were, with the exception of one, signed "P. pro ex. George Gouthwaite—Jane Gouthwaite." The bank paid her the dividends, in consequence of her having produced the probate. The name of the said Jane Gouthwaite was not entered in the share register list, or the books of the said company, as the proprietor of the said shares, or any of them, but the said shares stood in the said share register in the name of the said George Gouthwaite, with a note thereunder written, "Probate of George Gouthwaite's will, exhibited on the 6th August, 1842, Jane Gouthwaite, executrix;" and in the list registered at the stamp-office they stood thus: "George Gouthwaite, executor." The following were the clauses of the deed of copartnership which were chiefly alluded to and relied upon in the argument:—

13. "The property of the company, as between the shareholders thereof and as between their respective representatives, shall always be considered personal estate, and there shall be no benefit of survivorship amongst the shareholders, so that every shareholder shall have a distinct and separate right to his shares, and the same shall be vested in him to and for all intents and purposes as part of his personal estate, but subject to such provisions in the deed of settlement as shall for the time being affect such shares."

14. "Each shareholder shall be entitled to, and interested in, the profits, and be subject and liable to the losses of the company in proportion to his shares."

26. "Whenever, by any means whatsoever, any shares shall become actually forfeited, or shall be duly and effectually transferred to a new holder, then, and in such case, and not before, the responsibility of the previous holder, as a member of the company in respect of such shares, shall (so far as the law will in that behalf allow) cease and determine, and such previous holder shall be exonerated and released from all subsequent claims, demands, and obligations in respect of the same shares, and from all future observance and performance of the covenants, conditions, stipulations, and agreements in the deed of settlement contained in respect of the same shares; provided, nevertheless, that nothing in this article contained shall extend, or be construed to extend, to release the previous holder of shares so forfeited or transferred as aforesaid from his proportion of the losses, if any, sustained by the company up to the period of his ceasing to be such holder as aforesaid."

27. "Before any assignee of a bankrupt or of an insolvent debtor shall sell or transfer any shares vested in him in that capacity, or receive any dividend in respect of such shares, and before any executor, administrator, or legatee of a deceased shareholder, or any husband of a female shareholder, shall sell, transfer, or assign any shares vested in him in any such capacity, or shall become a member of the company in respect of such shares, or receive any dividends in respect of the same, he shall leave for inspection, at the banking-house of the company in Newcastle-upon-Tyne, the deed or instrument of assignment, probate of the will, or letters of administration under which, or the certificate of the marriage with, the person in whose right he shall claim to be entitled to the same shares, or shall otherwise prove and establish his title to the satisfaction of the directors."

28. "The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent debtor, possessed of shares, shall not be a member of the company in respect of such shares as shall be vested in him in any of the aforesaid capacities respectively, but such assignee of a bankrupt or insolvent debtor shall sell and dispose of such shares in manner and subject to the provisions hereinbefore expressed and contained with respect to the sale and transfer of shares; and any such husband, executor, administrator, or legatee as aforesaid, shall be at liberty either to sell and dispose of the shares so vested in him, in like manner and subject as aforesaid, or at his option to

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become a member of the company in respect of such shares, on complying with the provision of these presents as next hereinafter expressed in that behalf."

29. "The husband of any female shareholder, or the executor, administrator, or legatee of a deceased shareholder, who shall be desirous of becoming a member of the company in respect of the shares vested in him in any of such capacities respectively, shall give notice in writing at the banking-house of the company in Newcastle-upon-Tyne of such his desire, in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose place or right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted and become a member of the company in respect of such shares, and have the same transferred into his name accordingly, and shall be personally charged with the duties and liabilities incident to the ownership of the same."

30. "The husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, who shall not, under the provision lastly hereinbefore contained, elect to become a member of the company in respect of the shares vested in him in any such capacity, and also the assignee of any bankrupt or insolvent debtor possessing shares, shall be entitled to receive any dividend which shall have become due on the shares so vested in him in any such capacity as aforesaid, before his title to the same shares accrued, but no dividends which shall become due on the same shares after his title shall have accrued shall be payable to, or demandable by him, but shall, till some person shall have become a member of the company in respect of the same shares, remain in suspense, and shall not be paid till the transfer thereof shall be completed, and the new holder thereof shall claim the same; and every transfer shall carry with it the profits and interest, and share of capital and surplus or guaranty fund, in respect of the shares transferred, so as to close all the right and interest of the party or parties making such transfer in respect of such transferred shares."

31. "In case any person in whom any shares shall, by original subscription, purchase, marriage, bequest, representation, or other mode of acquisition, become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing for that purpose, neglect or refuse to execute the same, it shall be lawful for the directors to declare the shares so vested in such person so neglecting or refusing, and all benefit and advantage whatsoever incident thereto, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

103. "And lastly, that each of them, the said several persons parties hereto, whilst a holder of any shares originally or newly acquired in the capital of this company, and his or her heirs, executors, and administrators, shall and will, for or in respect of shares being and remaining part of the assets of the covenanters, observe, perform, fulfil, and keep all the covenants, articles, stipulations, and agreements

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(including additions, alterations, variations, and modifications to be made in pursuance of the provisions hereinbefore contained) which are or ought to be observed, performed, fulfilled, and kept by him or her, the covenantor, or his or her heirs, executors, or administrators respectively, in respect of, or in relation to, such shares so for the time being remaining part of his or her assets, and according to the true intent and meaning of the same covenants, articles, stipulations, and agreements respectively," &c.

In the first instance, the master, Mr. Farrer, included the name of Jane Gouthwaite upon the list of contributories, but subsequently he struck it out, upon the ground, that, under the 13th section of the joint-stock banking act, 7 Geo. 4, c. 46, all liability was determined by the expiration of three years from the ceasing to be a member, and that there was no distinction in law between the case of a shareholder ceasing to be a member by death, or by transfer of his shares; and that the rule of construction of the 13th section of the 7 Geo. 4, c. 46, applied as well to the liability of shareholders to contribute *inter se*, as to the liability to creditors. The vice chancellor was of a contrary opinion, and referred it back to the master to review his report; with the alternative declaration as above stated.

Rolt and *T. Stevens*, in support of the appeal motion, referred to the 29th clause in the deed of partnership, and contended, first, that Jane Gouthwaite had not, by her conduct, become, by any new contract, either personally or otherwise, a shareholder in the company, either at law or in equity; secondly, that the estate of her husband was not liable now to pay any debt of the company, or to contribute to a payment made to creditors by other partners in the company; more than three years having elapsed since the husband ceased to be a member of the company. On this point they referred to the 11th, 12th, and 13th sections of the 7 Geo. 4, c. 46, and cited *Barker v. Buttriss*, 7 Bea. 184; s. c. 13 Law J. Rep. (N. S.) Chanc. 58.

Bethell, *Bacon*, and *J. V. Prior* for the official manager. A great part of this discussion, namely, that this lady, as executrix, is liable to be a contributory, is concluded by decision. *Armstrong's Case*, 1 De G. & S. 565, has decided, that where a person dies, being a member of this company, his assets are liable until his executor agrees to become a partner; and if the company receives that person as a member, and registers him, then the estate is discharged; but so long as he is not accepted, the assets of the deceased member remain liable. This is clearly the effect of the 103d and 30th clauses of the deed of partnership, that so long as the vacancy or "suspense" of ownership remains, so long does the estate of the deceased owner remain liable. Upon principle alone, without the assistance of the deed of partnership, the same consequence would follow, for whatever liability rested upon the dead man attaches upon his executor. If there was any thing in the point as to the lapse of three years being a bar, it is impossible not to suppose that the statute would have been referred to in *Thomas's Case*, 1 De G. & S. 579.

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[*Lord Chancellor.* The provision of the stat. 7 Geo. 4, c. 46, as to the three years, is a provision as to creditors' rights only; it is a very different thing as to liability between the partners themselves.]

Certainly; but even if your lordship should hold a contrary construction, the 26th clause of the deed amounts to an express contract that the liability shall continue. The other side contend, that when a member of the copartnership *dies*, that is a *ceasing to be a member of the company* within the meaning of the 13th section of the 7 Geo. 4, c. 46. This we deny, for the terms of that section are inapplicable to such a case, as execution never issues against the executor of a partner. The other side also contend, that, in consequence of certain formalities not having been complied with, Mrs. Gouthwaite cannot be considered a member of the company; but Mrs. Gouthwaite has treated the shares as part of the assets of the testator, and thereby a valuable interest accrued to the estate in the shape of dividends; how, then, can she say that she ought not to be on the list of contributories, as representing the estate of the testator? Several cases have decided, that where a party has done something, as between himself and the company, which estops him from denying that his title is complete, he cannot avail himself of the absence of certain formalities directed by the deed of partnership, in order to prevent him being held liable as a partner. *The Birmingham, Bristol, and Thames Junction Railway Company v. Locke*, 1 Q. B. 256. *The London Grand Junction Railway Company v. Graham*, Id. 271. *The Chellenham and Great Western Union Railway Company v. Daniel*, 2 Q. B. 281, 6 Jur. 557.

[*Lord Chancellor.* But estoppel must be mutual; if the company can say you are not a shareholder, it would be equally available for the shareholder to say so.]

But the company has never said that this lady was not a shareholder. It is preposterous to suppose that liability to creditors is to be the rule as to the measure of liability as to partners *inter se*. No case has decided this. *Barker v. Butress* (ubi sup.) does not touch the point; and *Ness v. Armstrong*, and *Ness v. Angus*, 13 Jur. 874, were both cases of actions by creditors.

[They also referred to *Reaveley's Case*, 1 De G. & S. 550.]

Rolt, in reply. The arguments of the other side resolve themselves into this — that the principles upon which the court ascertains the liability of a person to partnership debts are different where the account is taken *inter se*, from what they are in determining the liability to pay debts where the question is raised upon a suit by creditors; and then, founding themselves upon that difference, they say, that, in the present case, while the shares remained in suspense, they belonged to the estate of Gouthwaite, and that his estate remained liable, even though, as against creditors, the executrix would have a good defence. Our view of the case is this — first, that the form of the order appealed from is wrong; it concludes the master from excluding this lady's name from the list; it does not assist the master, but, on the contrary, it fetters him in his own judgment. Next, we say, that if the difference contended for the other side

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exists, it is in our favor, for there may be a liability to creditors without a liability to contribute *inter se*; but the converse is not true. A party may, by collateral contract, become liable to the partnership without being liable to creditors; but that is a special case. What is there special here? The other side say, the winding-up acts, the banking act, the deed of settlement, and the receipt of dividends. Do any of these alter the rule? The winding-up act defines who shall be contributories, but it leaves the test of liability the same as before. The banking act does not make a difference in favor of the official manager, but rather for us, for it limits the liability as to creditors, but it does not say a word as to a limit *inter se*. There is nothing to be collected from the clauses of the deed as to what is the effect of the suspense of shares; but I submit, that, until the suspense be determined, you cannot determine any thing about them; but when it takes place, it relates back to the death of the testator. The only parties who have the power of determining the suspense are the directors. The deed rather assists my construction, and there is nothing in the 28th and 29th clauses, but what confirms the view, that an executor is not a member, upon the death of the testator, until he does certain things. The covenant in 103d clause of the deed is, not that the heirs and executors shall stand in the same position as the party himself would have stood in, but only, that having ascertained the liabilities previously created, then he covenants to abide by them. The other side contend, that the 26th clause speaks of the representative of a deceased party, but it clearly only means a party having a right vested in him different from a *member*. I submit, therefore, that there is nothing in this case to alter the rule as to ordinary partnerships.

JANUARY 13. LORD CHANCELLOR. The facts of the case on which the question turns are very few. There is no doubt that Mr. Gouthwaite was an original shareholder, and continued to be a shareholder up to the time of his death. It is also proved that this company has sustained losses. If Mr. Gouthwaite was a shareholder from the beginning down to the time of his death, he must, of course, be liable as a contributory for any losses during that period. Then, after Mr. Gouthwaite's death, the executrix manifests her title to the shares by the production of the probate of the will; and she afterwards receives, between 1842 and 1846, several dividends which accrued due subsequent to the testator's death; and all the receipts, with the exception of one, are signed by her in her representative character. There is one which, it appears, is signed in her own name without that description; but it is manifest that that was understood to be received under the same circumstances, because that was the first receipt, and subsequently to that she signed in her representative character; or, what is more strong than that, somebody signed by her procuration in regard to her representative character, and the company returned her shares in the register list as shares held by the executrix of Mr. Gouthwaite. Therefore, I think, it would appear that the lady, from the first to last, received dividends as executrix of

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her deceased husband, and in respect of the shares which he had held. Now, the company have sustained losses, and they say to the lady, "Your husband was the owner of certain shares; those shares remain in his name up to the present day; he was liable during his life to contribute in respect of his being actually a member, and having signed the deed, and his estate continued liable because the shares continued to be a portion of the estate; they have been treated by you as a portion of the estate, and you have taken them as a productive portion of his estate, by receiving the dividends in your representative character; we, therefore, call on you to contribute." On being called to explain the grounds of this claim, they say, "By sect. 14 of the deed which your husband signed, it is declared, in terms and form and manner which amounted to a covenant, that your husband would contribute his proportion to any loss that might be sustained, regard being had to the number of shares held by him. That bound him by a covenant which has never been determined, because, by another section, (sect. 103,) he covenanted that his executors should be bound to the performance of all those covenants to which he would have been bound; and it appears by another section, that you stood in a situation which subjected you to certain conditions; that is to say, you could not, according to the provisions of the deed, be admitted as a member, because you were an executrix. You might, if you pleased, in respect of your ownership of the shares in your representative character, have become the owner of those shares in your own right, and in that case have become a member; but you were not entitled to receive a dividend which became due after your husband's death, though you, in your representative character, were owner of the shares, until you elected to become owner in your own right, and until you perform certain other requisites. As, therefore, your husband agreed to contribute to all losses, and that his executor should do so after his death, to the extent to which he would have been liable, and as these shares have remained part of your husband's property, you fall expressly within those terms. We do not, therefore, discuss with you what would have been your situation if your husband had been a joint partner with certain other persons, there being no deed, and the whole matter being left to the ordinary principles of the law, as applied to partnerships, in the absence of express stipulation, because we call on you in respect of your husband having been a partner, and having become a partner in express terms, similar to those the law would imply—namely, to contribute in due proportion to the losses of the firm. But your husband has gone further, and has expressly covenanted that his executors should remain liable while the shares continued part of his estate." It appears to me, therefore, that the 14th and 103d sections do place the party in that situation, though clearly it may be said, not as a member, by reason of her not having performed the requisites stipulated by the deed in order to constitute a member. The consequence is, that the shares remained part of the estate, and were so treated, and while so remaining, the husband covenanted that the executor should perform all the covenants in respect of those

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shares to which he was liable; and he having been a member from first to last, there was no period during which any loss would be sustained to which he would not have been bound to contribute. It has been contended, first, that the 103d section had not the effect of binding her, because she never was a member, and could not be a member. I cannot exactly follow the course of argument on that point, because the covenant was intended distinctly to apply to the case where clearly the person was not a member, to wit, an executor. It appears to me, therefore, that supposing there were nothing in the case but the 14th and 103d sections which applied to it, this lady would be liable to be placed on that list as a contributory in her representative character, unless she shall have done some acts which, when duly considered, shall be deemed to have the effect, as between her and her copartners, of constituting her a member in her own right. She may have done that; but, in the absence of any satisfactory evidence that she has done that, there it remains. The shares were vested in her in her representative character, and that covenant applies.

Now, with respect to all the decisions, as to how far the provisions of the deed may be dispensed with by the conduct of the directors and an individual shareholder, and yet render the party liable as a member, and so the owner of shares, that may be matter of some doubt. I know that a very recent case has been decided by the court of exchequer, in which a party was held to be a member notwithstanding the requisites of the deed had not been complied with. I cannot name all the parties to the case, but I know that a Mrs. Morris was the lady charged in respect of her being a member of the company. It was an action for a call, and she was charged in respect of the call, although she had not become a member according to the requisites of the deed, but was considered to have done that which was equivalent, and therefore constituted her a member by reason of certain acts between her and the directors. I have said before, what I know in fact, that that was a decision which the parties were not disposed to acquiesce in; but a compromise took place between them, and, so far as that may tend to derogate from that decision, it does so. It was, however, a unanimous judgment of the court of exchequer, and I rather think Lord Cranworth was a party to that judgment; but at all events it was a judgment, I know, pronounced in full court. Therefore it seems to me, unless there be some other ground on which this lady is exempt from her liability as a contributory, that, as the case now stands, it appears to be clear that the shares remain as part of the representative estate of the deceased testator, the lady's name never being introduced as the owner of the shares down to the present hour; and, for the reasons I have before mentioned, I think that, unless that be altered, she would be liable in her representative character to be inserted on the list as a contributory. Now, the order that has been made merely states that this lady is to be deemed a contributory, but whether in her representative character or her own right, it leaves to the master, but settles the question that she is a contributory. Well, the master, not having

entered into the question of whether she was liable in the one character or the other, but having entered into the question generally of whether she was liable at all, decided she was not, but decided that, quite independently of the particular facts of the case, with the exception of one, namely, that the husband died within three years before the claim was made. Having decided it only with reference to that fact, it would not, of course, have been correct for the vice chancellor to have gone into that question which the master had not gone into, and to have assumed the original jurisdiction of deciding precisely in what character the lady was liable, that being matter of dispute which the parties had not been heard upon before the master, and on which the master could not be supposed to have formed an opinion. The vice chancellor says, "The master has decided that this lady is not liable to contribute by force of the banking statute. I am of opinion that that did not amount to a discharge; and on the facts before me, that she was executrix, and held shares in that character, that would make her liable, unless she had changed her character, and had become the owner of the shares in her own right; as to which I have not had an opportunity of forming a judgment. I am satisfied the master's decision, to the whole extent it went, was wrong. I say the statute did not discharge her; therefore the master must ascertain in which of those rights she was liable." It seems to me that that explains and shows that the order, in its alternative form, is perfectly correct. What is the ground, independently of the deed itself, which I have dealt with, on which it is said the party is discharged? Why, it appears to be the banking statute. There is great difficulty in arranging the liabilities of a fluctuating body, it being almost impossible to do so, because, if a creditor had to look, when he was about to bring an action, to the parties liable at the time of the contract, they might be altogether different parties from those who had had the benefit of the contract. The contract might be to supply goods at various times, which goods might have to be supplied every six months, and the whole body of partners might have changed before the goods were supplied; therefore those who had the profit of the contract would be different from those who formed the contract; or, again, those who had the profit of the contract might go out, and the members of the company at the time when the action was brought might be totally different. There being that difficulty, although it was intended by the statute to permit banking companies to be established, yet it was not intended that the creditors and others who might deal with them should be put to trouble to find out who were to be their paymasters. Therefore, to get rid of a good deal of trouble and difficulty, the act enacts an arbitrary rule of liability, and says, those shall be liable to the creditors of the concern who were members at the time of the contract, or at the time the goods were sold, or at the time the judgment was recovered, although they had nothing to do with the contract or the goods. It is an entirely arbitrary rule, framed, I apprehend, with a totally different intent to that of regulating the rights as between the shareholders themselves. It had in view one object only, and that was, to facilitate the remedy of cred-

itors. But at the same time, as it might make persons liable under the statute for debts to which they would not be liable in the ordinary principles of law, and which might fix on them debts for which they have received no benefit—as, for instance, if a man held shares when a contract was made, and afterwards sold them, and those who came after him had the benefit of the contract, and three years pass, and afterwards (those who had been trusted for so long a time never having paid) an action is brought against them—why, it is true, that he is liable under the contract, because he made the contract, but he would not be liable, because he was not a partner at the time of the judgment: now, under such circumstances, the statute says, we will not leave these persons in total uncertainty whether they were ever discharged or not. As I before said, the legislature would not leave every man in the wretched state, when he died, of not knowing for how many years his estate might be liable to the debts of a joint stock company, but they say, all proceedings against him at the suit of creditors must be brought within three years, or else those who succeed him will be liable, and his estate will be discharged. They appear to me to have been dealing in that case with creditors, and creditors only. Creditors would stand in a different situation; creditors would know when the debts became due, but a joint-stock company cannot tell when the loss arises. There were a number of debts owing, probably continuing to be owing for a considerable time, and then, by reason of some circumstance or other, a loss arises to the company, not in transactions which have commenced within a recent period, but in transactions that have commenced long ago, in a gradual course of operation and dealing, and at last, unexpectedly, a great loss arises. That will sometimes be the case. Therefore it might operate very injuriously and unjustly indeed, to say, that, as between the partners themselves, the partnership should not be so wound up as to ascertain what is the state of loss and profit only for three years after a member retires; or to say that those who go out in the mean time should not be liable to make good to their partners, because, as regards creditors, they get rid of liability: now you come to take an account between the partners themselves—of the relation in which you would administer their liabilities, independently of the statute—you shall not make the partner in all probability liable who comes in after the debt has been contracted, or who has gone out before the goods have been received; you will deal in a different manner in adjusting those liabilities, and the manner in which you shall deal must have reference to the form of the partnership. It seems to me, therefore, that that section in the banking act has not the effect of varying the liability to contribution between the partners themselves. The case referred to of *Barker v. Buttriss* is strictly a case between the creditor and the shareholder; and it is a decision, I apprehend, unquestionable for its accuracy. A creditor has not sued a shareholder for three years after he had ceased to be a partner, and then, because the party died, and his estate was to be administered in equity, he comes and says, I have a judgment which I have recovered against the public officer; I now claim to be admitted as a creditor in this administration suit

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against the deceased shareholder. Well, you have got your judgment, but did your judgment create a debt at law? Because, as far as you are concerned, law and equity are the same. If you have no debt at law, you have no debt in equity. There may be cases where a man may have a debt in equity, though not at law, though it is on the surface an apparent debt for goods sold and delivered; but when a debt in equity and at law rests precisely on the same principle, there, of course, the non-liability at law is followed by non-liability in equity. The law says, you are not entitled to issue execution on these judgments; they are not available, therefore, at law, and you have no ground to distinguish them in equity — you have nothing but your legal rights. The cases seem to me, therefore, perfectly consistent, nor do I recollect that there is any other case which at all goes the length of controlling my judgment upon the construction of that section in the banking statute; I think it is perfectly unfettered; and the question is, Does that, of itself, discharge partners, as between each other, from contribution, when the deceased partner's estate is not called on to contribute until three years after his death? It appears to me it does not, and that the liability to contribute must be judged of by other circumstances. Now, the other circumstances are the two sections of the deed, the 14th and 103d; and, in respect of those two sections, the conclusion, in point of fact, is, that the party held shares which bound him by covenant to contribute in proportion to the shares so held; and that, by the 103d section, he bound his executors to perform such covenant as if living, he would have been bound to perform, and that is, to contribute to losses while the shares remained in his executors' hands as part of his property. Now, in this case, it is clear the shares were in the executrix's name for some time. Whether they ever got out of her name in effect and fact, is not sufficiently before this court to enable the court to determine when the liability in her representative character ceased, and when the liability in her own right commenced. It appears to me, therefore, that the decision of the vice chancellor was right, and that the appeal must be dismissed.

Appeal dismissed, with costs.

WARNER v. WARNER.¹

November 12, 1850.

Will — Codicil — Construction — Present Intention — Illegitimate Children described as "Children" — Children — Gift to Illegitimate Children.

A testator, possessed only of personality, by the residuary clause of his will bequeathed the same to his wife for life, and after her decease to his children in certain proportions. Hav-

¹ 15 Jur. 141.

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ing subsequently acquired real estate, he made a codicil, by which he left certain shares to his wife, "on the same terms as I have every thing else, (every thing I possess I leave her :") —

Held, that the words showed a present intention, and passed the real estate.

A testator bequeathed a portion of his estate in trust for C. P. W. for life, and after his death, "the interest for the maintenance of C. P. W.'s wife and education of his children; at his wife's death, the principal to be equally divided among his children then living." C. P. W. at the date of the codicil was unmarried, but had illegitimate children, of which fact it was assumed the testator was cognizant :—

Held, that such children were excluded.

THE testator in the cause, Kilpin Warner, by his last will and testament, dated the 18th January, 1828, after giving various specific legacies of money, furniture, &c., to his wife and children, gave the residue of his estate as follows: "And as to, for, and concerning all the rest, residue, and remainder of my moneys, securities for money, and all other my personal estate and effects, of what nature, or kind soever, of, in, or to which I, or any person or persons in trust for me, shall be entitled at the time of my decease, I give and bequeath the same unto my said wife, and the said daughter Mary Ann, and my said —¹ George Warner, their executors, and administrators, and assigns," upon certain trusts which were therein-after declared, namely, to convert into money and invest, to pay the annual produce to the testator's wife for life or during widowhood, and after her decease or marriage to divide the fund in certain proportions between the sons and daughters of the testator. At the time of making the will, the testator had no real estate, but having subsequently acquired real estate, by the fourth codicil to his will, dated the 10th May, 1838, he provided as follows: "The forty lead shares I had left my dear wife, Mary Ann, I have now sold for 2100*l*, which I leave to her in their place, on the same terms as I have done every thing else, (every thing I possess I leave to her,) to be divided among my children at her death, as expressed. (The money the lead shares fetched have lent to my trade.) Kilpin Warner." The first question was, whether under that codicil the real estate passed.

W. P. Wood and W. A. Collins, for the plaintiff, the heir at law.

Roundell Palmer and Speed, for the defendants.

KNIGHT BRUCE, V. C. The testator appears to have shown an accurate knowledge of the distinction between the past and the present, between a reference to a past act and a declaration of an intention of doing a present thing, for he says, "The forty lead shares I had left my wife, I have now sold for 2100*l*, which I leave to her in their place." A knowledge of law would have told him that that sum would pass under the gift of the general residue of his personalty contained in his will, without more; but either from not being aware of the law, or from forgetting it, or for the sake of greater caution, (for even lawyers sometimes use superfluous language,) he says, "which I leave to her

¹ Sic in will.

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in their place," thereby indicating a present act; and he goes on to say, "on the same terms as I have done every thing else." There he correctly refers to the past, whether superfluously in point of law, or whether with an incorrect knowledge or remembrance of the law, is immaterial. He shows, however, that the distinction of time in reference to the act is present to his mind. After doing that, he directs in a manner which plainly indicates, and must, at all events, on every ground, be assumed to indicate, the commencement of a parenthesis, for he says, "(every thing I possess I leave to her,)" thereby indicating a present act, and in the same language as he had used in respect to the present act touching the 2100*l*, which, whether necessary or superfluous, he considered it right to leave in present words. He then ends the parenthesis, which, if what he has written is to be viewed grammatically, must be considered, perhaps, as rather in the extreme of correctness than otherwise, because, having two sentences, or two members of a sentence, not necessarily connected together, and perhaps rather and in fact disjointed, he proceeds to add immediately a third sentence, or a member of a sentence, which he appropriates to both; and I apprehend the conclusion of one of them in a parenthesis is correct in point of grammatical construction and writing when that intention exists; and, therefore, in point of correct composition and correct expression, he must be thought to have said this: "I leave to her the 2100*l* on the same terms as I have done every thing else; every thing I possess I leave to her." Then he unites the will in one channel,—"to be divided amongst my children at her death." And my opinion is, that this will is not incorrect in point of grammar if that construction is put on it, which is opposed to the heir at law. Then comes the literal and exact meaning of the words "every thing I possess I leave to her." These words are large enough to include the real estate, unless there is a correcting context. Here there is no correcting context, and the probability is, that he would have wished, if I may speculate on the subject, to include the real estate. I therefore think, that, in letter and in spirit, it is the correct construction of the codicil to say that the real estate which he did pass, did give by it, in the same words, was for the same purposes as those for which his residuary personal estate was given by his will.

After the case had been thus far disposed of, another point arose. The testator, Kilpin Warner, by the first codicil to his will, dated the 27th May, 1830, declared that "the proportion of my estate my son Christopher Parker Warner is to have to be in trust, (my executors to be the trust,) for him to receive the interest only during his life; after his death, in trust, the interest of which for the maintenance of his wife and education of his children; at his wife's death the principal to be equally divided among his children then living, as they attain the age of twenty-one years, share and share alike; if only one child living, that to have the whole. The proportion of my estate my son Henry Warner is to have to be in trust, (my executors to be the trust,) for him to receive the interest only during his life; at his decease to devolve equally among my children then living, provided he has no

children born in wedlock; in case any, in same trust, to be equally divided among the whole, share and share alike, as they attain the age of twenty-one years; if only one child, that child to have the whole. The sum to be deducted out of the proportion of my estate my son Simeon Charles Warner is to have, is 870 $\frac{1}{2}$ l., the remainder (which see bond for) at his death to be divided equally among his brothers and sisters then living, provided he has no children born in wedlock; if he should, then in trust, (my executors to be trust,) his proportion to be divided, share and share alike, among such children, as they attain the age of twenty-one years; if only one child, that child to have the whole." The master had reported that the plaintiff, Christopher Parker Warner, had not had any issue of his marriage, but it appeared that he had illegitimate children by the female whom he subsequently married; and it was argued that the testator, when he executed the codicil in question, was aware of that fact. The question was, whether such children could take under the codicil.

The Attorney General, for the illegitimate children, submitted that this was a case in which the court would allow extrinsic evidence to be received. It was ambiguous what was meant by "children." Christopher Parker Warner was not married at the time, and the testator, who was his father, must have known that he had not any children born in wedlock.

The following cases were cited: *Godfrey v. Davis*, 6 Ves. 43. *Swayne v. Kennerly*, 1 V. & B. 469. *Hart v. Durand*, 3 Anst. 684. *Woodhouselee v. Dalrymple*, 2 Mer. 419. *Wilkinson v. Adam*, 1 V. & B. 452. *Harris v. Lloyd*, 1 Turn. & R. 310.

Knight Bruce, V. C. In *Wilkinson v. Adam*, Mr. Bell said, if that case were decided as it was ultimately decided, he would burn all his books. It has often been considered to go to the extreme verge of the law. In this case, the court is bound to look—to take notice, so far as the means of knowledge is afforded it, of all that the testator knew himself, and the circumstances in which he was placed when he made his will. But when that is done, still it is the will that is to be construed. Here I assume, for every purpose, that the gentleman in question was living with a lady as his wife, and was not married; that she bore his name; that she lived as his wife; that she was recognized and appeared to the world as his wife; and that there were several children of this connection, who in all respects were called and treated as legitimate children; and that all the facts which I have just mentioned were known to the testator. When that is all assumed and added to the case, still the will is to be construed, and then the question is, whether, if the testator had meant that legitimate children only should take, he could have expressed himself more clearly than he has; in other words, whether there is any vice or error in the expression, he gives the property to his son for life; after his death, the interest "for the maintenance of his wife"—not saying his present, not saying what wife, but his wife, a name rather of the character than of the individuality, if I may use

Ex parte Cropper, in re The St. George Steam-packet Company.

such a form of expression — “and education of his children; at his wife’s death, to be equally divided among his children then living.” The proper meaning of these words is that of legitimate children, whether born or in existence when the codicil was made, or born or in existence after, who “shall be living at his death;” and the evidence that has been mentioned, whether it excludes the probability, or creates a probability, that he must have meant the words in an incorrect sense, that he must have meant the words in a sense for the purpose of expressing which he has incorrectly used them, is wholly excluded by the words introduced into another part, “born in wedlock.” You must alter the will before you can arrive at the conclusion that he meant these children, whom there is so great a probability he did mean; but to include them would be not only to go against the authorities cited, but would be, in my judgment, against all principle; it would be, to all intents and purposes, making a will for the testator, not construing a will — making a will which perhaps he intended to make, but did not make, and which it is to be regretted, perhaps, that he did not make. These children, therefore, must be dismissed from the bill.

Ex parte CROPPER,¹ in re THE ST. GEORGE STEAM-PACKET COMPANY.²

December 12, 1850.

Joint-stock Companies Winding-up Act, 1848 — Expenses of obtaining the Benefit of that Act as regards a particular Company.

The deed of settlement of this company contained a clause for its dissolution in a particular manner, in certain given events. In 1843 the company was dissolved, and a committee was appointed to wind up its affairs. The then existing state of the law rendered it very difficult to proceed effectually. The committee, who had appointed a solicitor, authorized him to incur expenses in order to procure the introduction in a public act of parliament of clauses which would be applicable to the case of the company. The winding-up act, 1848, was passed, and an order under it was obtained for the winding-up of the affairs of this company. The committee claimed before the master to be paid the expenses so incurred out of the assets of the company, but the claim was rejected by him, and, on appeal, his decision was affirmed, the court being of opinion that the expenses were incurred in employment beyond the functions of the committee to order.

THE St. George Steam-packet Company was ordered to be wound up (the same having been dissolved) under the winding-up act. A motion was now made on behalf of Edward Cropper, Ebenezer Pike, Jonathan Pain, George Braithwaite Crewdson, and John Potter, that the decision of Master Farrer, made on the 22d November, whereby he declined to sanction the payment out of the assets of the company of the bill of costs, marked A, mentioned and referred to in the said

¹ 15 Jur. 143.

² As the evidence in this case discloses in some measure the history of the winding-up act, 1848, and as the original intention seems to have been to meet the case of this particular company, the contents of the affirmation of the solicitor to the committee is stated nearly entire.

Ex parte Cropper, in re The St. George Steam-packet Company.

master's certificate, might be reversed, and that the bill of costs might be ordered to be referred to the proper officer to be taxed, as between attorney and client; and that the amount, when so taxed, might be ordered to be paid to the said Edward Cropper and the others by the official managers of the company, out of its assets in their hands. The bill of costs in question was incurred in the manner and under the circumstances stated in the affirmation of Thomas Rigge, a solicitor of the court, and one of the Society of Friends. He stated that he and his partners were, previously to the dissolution of the St. George Steam-packet Company, employed by the committee appointed by the general meeting of the shareholders to investigate the concerns of that company, to advise them on the best mode of dissolving the company and winding up the affairs, and of making provision for the payment of the large debts and liabilities due by the company to its creditors. The company was dissolved on the 14th September, 1843, under the powers contained for that purpose in the 72d clause of the deed of settlement, by the votes of the shareholders present in person and voting at two successive meetings of the proprietors duly convened according to the requirements of such clause, the first of such meetings being held on the 1st August, 1843, and the second on the 14th September, 1843; and at such last-mentioned meeting Abraham Wood, Ebenezer Pike, and Jonathan Pain, being three of the directors, and Edward Cropper, George Braithwaite Crewdson, and John Potter, three of the shareholders of the said company, were appointed a committee for effectuating the dissolution and winding up the affairs and concerns of the said company; and the said committee, immediately after its appointment, appointed Mr. Rigge and his partners to act as their solicitors. Previous to the dissolution, the directors had issued circulars to the several shareholders, requesting a contribution of 50*l.* per share, towards paying off the liabilities of the company; and at the time of the dissolution, about the sum of 70,000*l.* had been received on account of such contribution. At the time of the dissolution, the company were indebted to various persons in the sum of about 162,000*l.*, and had assets estimated to produce 91,000*l.*, leaving an estimated deficiency of about 71,000*l.* The company consisted at the time of about three hundred and fifty shareholders; and the committee, after a careful examination of the accounts, and consideration of the means of the different shareholders, were of opinion that it would require the sum of 50*l.* per share from those who were able to pay, but had not already paid, the contribution of 50*l.* per share, and the further sum of 60*l.* per share from all those shareholders who were able to pay the same, to enable them to discharge the debts and liabilities of the company. The committee caused a full statement of the accounts to be printed, and circulated amongst the shareholders, accompanied by a report, signed by the secretary, setting forth their opinion as to the state of the company, and requiring the immediate payment of those sums of money. The sum of 100*l.* per share, being the total amount authorized to be raised by the deed of settlement from each shareholder, having been fully paid by the shareholders, the committee had no

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power under the deed, by action or otherwise, to enforce payment of the sums required for the purpose aforesaid. Previous to the dissolution of the company, Mr. J. C. Binger, at the request of the directors and committee of investigation, visited Ireland for the purpose of waiting on the various shareholders who had not paid the 50*l.* contribution, and pressing upon them the absolute necessity for such payment; and during such visit Mr. Rigge was informed and believed, that J. C. Binger personally visited the greater number of the shareholders living there, but the amount which he was enabled to induce them to pay was small. After the dissolution, Mr. James Powell, the secretary appointed by the winding-up committee, at their request went over to Ireland for the same object, and Mr. Rigge had been informed and believed, that during his visit there he saw the greater number of the shareholders who were in arrear, and urged upon them the necessity of making the payments, but he was only enabled to induce them to pay a very small amount. The committee having no direct means of obtaining payment of these sums, Mr. Rigge, with their sanction, induced several creditors to issue writs of *sci. fa.*, on judgments obtained against the company, against several shareholders who had not paid. The holders of such judgments refused to issue the writs and take proceedings against the shareholders, unless they were indemnified from costs. Such indemnity was given, and several actions were brought and tried, but it was found that the expense of proceeding in this manner would preclude any beneficial result arising to the company; and on this, and also on the ground of the committee having been advised that such proceedings were illegal, the proceedings to enforce payment by writs of *sci. fa.* were therefore abandoned. The only mode left for the winding up of the affairs of the company, and enforcing an equitable payment towards the losses of the company by the different shareholders, in the then state of the company, was, as Mr. Rigge was advised, and so informed the committee, by bill, but that from the great number of shareholders, residing in different parts of England and Ireland, and the intricacy of the accounts, the attempt to wind up the affairs of the company by a bill in chancery would, after incurring very large expense, be useless for that purpose.

In the session of Parliament, held in the year 1844, the government introduced a bill for winding up joint-stock companies unable to meet their pecuniary engagements, 7 & 8 Vict. c. 111; but such bill, in the form in which it was introduced, only applied to companies then carrying on business, and not to such as had been dissolved, and the remedies proposed for winding up were altogether inapplicable to a company in the position of the St. George Steam-packet Company, inasmuch as the bill only professed to deal with the existing assets of the company, and contained no provisions whatever for enforcing payment from the shareholders in cases where the assets should prove insufficient for discharging the debts and losses of the company. Mr. Rigge, by the direction and with the knowledge of the members of the committee, accordingly went up to London at various times during the session, for the purpose of procuring

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such alterations in the bill as would be applicable to the St. George Steam-packet Company, and enable them to wind up its affairs. After various interviews with the board of trade, who had charge of the bill, and through the influence of different members of Parliament whom Mr. Rigge and his agent, Mr. Field, interested in the matter, various clauses were introduced into the bill, extending its provisions to companies which had been dissolved previous to its passing, providing for enforcing the ratable payment by shareholders towards the losses of the companies where the assets should prove insufficient for the discharge of their liabilities, and for rendering shareholders resident in Ireland and Scotland subject to the provisions of the bill.

At a meeting of the committee, held upon Mr. Rigge's return from London, he reported to the members of the committee then present the various steps he had taken for carrying out the purposes aforesaid, when such steps were fully approved of by the committee, and Mr. Rigge was then instructed to use his best exertions to procure the making of the orders in chancery requisite for carrying out the provisions of the act. Mr. Rigge accordingly, several times during the year 1845, visited London, for the purpose of having interviews with Lord Langdale and the board of trade, and other parties, and in endeavoring to procure the making of the requisite orders; but was at length informed by the board of trade, that, after an interview with the lord chancellor, they did not think that such orders were then at present required; but Mr. Rigge and Mr. Field, for the purpose of carrying out the provisions of the said act, had prepared the heads of such orders as appeared to them requisite for the purpose, and the board of trade, after many interviews, agreed to bring in a bill for carrying out the intention of the former act through the medium of the court of chancery. The government, in the session of 1845, introduced a bill for extending the provisions of the former act to Ireland; and as Mr. Rigge had been advised by counsel, that considerable doubt existed as to whether the St. George Steam-packet Company could be wound up under that act, inasmuch as the company was established in Ireland, and was otherwise treated as an Irish company, by the deed of settlement having been registered in the court of chancery there, and all the vessels of the company having been registered at the custom house in Dublin, Mr. Rigge applied for, and after considerable difficulty obtained, the insertion of a clause enabling the company to be wound up in England. During the sessions of 1846 and 1847, Mr. Rigge visited London many times, for the purpose of pressing forward the preparation of the said bill, and having interviews with Mr. Bellenden Ker, who was the counsel consulted by the board of trade in the matter on the details thereof; and though the government from time to time promised in the House of Commons that the measure should be introduced, yet, from the repeated delays that took place, it was not introduced until the latter end of the session of 1847. Mr. Rigge from time to time, at the meetings of the winding-up committee, reported fully to them the various steps which were taken to obtain the passing of the said measure, which were adopted and approved;

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and Mr. Rigge, from time to time, during the intervals between the meetings of the committee, corresponded with all the different members of the committee except Mr. Ebenezer Pike, and informed them of his proceedings, and from time to time received from all of them, except the said Ebenezer Pike, most urgent requests to press on the measure; and Mr. Rigge was satisfied that the measure could not have been prepared and passed without his constant and personal attendance in London.

The clause of the deed of settlement of the company under which it was dissolved, and under the powers of which the committee acted in winding up its affairs, was the 72d, and was in the following words: "That an absolute and entire dissolution of the company and determination of this partnership may lawfully take place on the terms hereinafter expressed, and on no other terms; that is to say, by and with the consent and approbation of two thirds at least in number and in value of the votes of the shareholders present in person and voting at each of two successive meetings of the proprietors, and each meeting to be, for that purpose exclusively, respectively convened by the directors, by one calendar month's notice at least, (to be signed by the clerk for the time being,) by advertisement in a Liverpool and Dublin newspaper; and that proper measures for effectuating such dissolution shall be taken by a committee, to be composed of three of the directors for the time being of the company, and by an equal number of persons to be elected by the majority of votes of the shareholders present and voting at the latter of such meetings; and that after such dissolution the affairs and concerns of the company shall, with all convenient speed, be wound up, and the debts and liabilities of and claims on the company shall be satisfied, discharged, or otherwise sufficiently provided for; and all the vessels, boats, engines, and other property and effects, securities or assets, guaranties, and other funds, and interest and benefit of existing engagements, shall be converted; and for that purpose all outstanding debts owing to, and the benefit of engagements belonging to, the company, may be sold for money, and the balance, if any, of the assets and property of the company shall be divided among the persons who shall be the respective shareholders at the period of dissolution, and their respective executors and administrators, ratably and in proportion to the amount of their respective shares at that time. Any of the shareholders, not being a director, may become purchasers of any of the assets of the company which shall be sold; and the majority of votes, according to the rules of voting hereinbefore contained, present and voting at any such special meeting to be convened for the purpose, may declare the accounts of the company finally closed, and the assets of the company fully administered, or with such exceptions as they may think fit to declare: and the directors, trustees, and all other parties to be relieved and discharged, with or without such exceptions, from all suits, claims, and demands under and by virtue or in consequence of these presents, and they shall be released and discharged according to such resolution, and in the forms and under the modifications thereof." The bill

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of costs for the journeys and professional advice in the course of the proceedings before mentioned, amounted to 2197*l.*, and for this amount the present applicants claimed to be creditors against the assets of the company, but the master had rejected the claim, and the present motion was by way of appeal from that decision.

Rolt and *Selwyn* argued, in support of the motion, that the expenses had been properly incurred. An act of Parliament was necessary to enable the committee effectually to wind up the affairs of the company, in pursuance of the powers entrusted to them. Whether that act was obtained as a private act, or as a public act, did not render the claim of the committee less valid. What was done was, under the circumstances, the best that could be done, and the expenses ought to be allowed. The master's decision ought to be reversed.

Bacon and *J. V. Prior*, for the official managers, were not called on.

KNIGHT BRUCE, V. C. It is very possible that a bill of equal amount might have been incurred by the committee, which the committee would have a right to charge to the company. That they have abstained from doing so cannot, however, I think, enlarge the powers of the committee so far as to entitle them to throw this amount, whether of a substituted bill or not, on the company at large. My opinion is, that the employment, in the course of which this bill was incurred, was an employment beyond the functions and powers of the committee. I suppose the committee must pay their solicitors; that they will settle among themselves. All I have to say is, that, whether the committee are liable for such a bill or not, I am of opinion that no case is shown for making the company liable. I refuse the motion, with costs.

CAPPER'S CASE.¹

December 19, 1850, and January 11, 1851.

Contributory — Deposit.

A person who agrees to take shares in a projected company, which becomes abortive, and to pay a preliminary deposit on them, is not thereby rendered a contributory even with respect to the deposit.

The case of *Aspith v. Sercombe*, 19 Law J. Rep. (N. S.) Exch. 82, approved.

THIS was a petition by Mr. Capper, praying that the decision of Master Brougham, placing the name of Mr. Capper on the list of contributories to the Direct Birmingham, Oxford, Reading, and Brighton Railway Company, might be reversed, and his name ex-

¹ 15 Jur. 145.

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punged therefrom. The documents produced by way of evidence were a prospectus of the company and two letters. The prospectus was to the following effect: "Direct Birmingham, Oxford, Reading, and Brighton Railway; registered provisionally, pursuant to the 7 & 8 Vict. c. 110; capital, 2,000,000*l*." It set forth the names and addresses of the members of the provisional committee (not including therein the name of Mr. Capper) and of the bankers, and stated that the solicitors to the said company were Messrs. Parkes, Smith, & Co., and the secretary, J. B. Rayner, Esq., and stated the objects of the company, and, amongst other things, that the railway, commencing at Birmingham, at a point contiguous to the railway from the north, would proceed through or near several places to Shoreham and Brighton; and the said prospectus proceeded to point out the probable advantages of the railway, and directed that application for prospectuses and shares might be made at the offices of the company, 46 Morgate Street, to the solicitors, and several other persons therein named. The following were the letters:—

"Form of application for shares.

"To the Provisional Committee of the Direct Birmingham, Oxford, Reading, and Brighton Railway. **B**

"Gentlemen,—I request that you will allot me fifty shares, of 25*l* each, in the Direct Birmingham, Oxford, Reading, and Brighton Railway; and I do hereby undertake to accept the same, or any less number you may allot me, to pay the deposit of 2*l*. 12*s*. 6*d*. per share thereon, and to sign the parliamentary contract and subscribers' agreement when required. Dated this 19th day of September, 1845.

"THOMAS CAPPER,

"17 Salisbury Street, Strand, coal merchant."

To this no answer was returned till the 18th October following, when this letter of allotment was sent, signed by the secretary, Mr. Rayner:—

"Sir,—The committee of management have allotted to you thirty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l*. 12*s*. 6*d*. per share, amounting to 78*l*. 15*s*., into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void. [Here followed a list of bankers.] This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the offices of the company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on or about the 27th October, and due notice will be given when the deeds will be sent into the country."

Mr. Capper did not appear to have proceeded further in the matter, and the company, having been abortive, was wound up under the winding-up act. Mr. Capper's name having been placed on the list of contributories, he applied to the vice chancellor of England to have it expunged.

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The case came on before Knight Bruce, V. C., who heard and decided it on the 8th August, 1850. It is reported in the 14 Jur. 1128. On the following day a similar case (*Kirby's Case*) was argued, and his honor then discovered that he had been under a misapprehension, and had thought that an interval of a year instead of a month had elapsed between the application for shares and the allotment of them; his honor thereupon, understanding that the appeal to the House of Lords in *Upfill's Case*, 14 Jur. 843; 1 Eng. Rep. 13, was then pending, directed the order in *Capper's Case* to be stopped. The case now came on before Lord Cranworth.

Roll and *Daniel*, in support of the application.

Bethell and *Roxburgh* opposed, and cited *Upfill's Case*, 14 Jur. 843; 1 Eng. Rep. 13. Their arguments are alluded to in the judgment.

LORD CRANWORTH, V. C. In this case, the master having placed the name of Mr. Capper on the list of contributories, a motion was made a few days before the vacation to remove the name from the list. I was disposed at once to make an order in conformity with the motion; but it was strongly urged on me by Mr. Bethell and Mr. Roxburgh, that this case was distinguishable from all or most of the others which have been decided, because here Mr. Capper has bound himself to take shares under circumstances which led necessarily to the conclusion that he had agreed to permit a part, at least, of the deposit which he had bound himself to pay to be applied towards the discharge of the preliminary expenses of forming this company; and so that, to some extent at least, he had become liable to contribute to those expenses; for in this case, as in a large proportion of those in which winding-up orders have been made, the affairs really to be wound up and the liabilities to be cleared are those, not of any existing company, but of parties who have endeavored unsuccessfully to form one. Though I did not feel that there was much force in the argument addressed to me, yet I wished to look into some of the authorities to which I was referred before I decided the case. I have now had an opportunity of doing so, and I have come to the clear conviction that Mr. Capper's name has been improperly placed on the list, and so that it ought to be removed.

These questions, as I have more than once remarked, are almost always questions of fact, and not of law. The law on the subject is now very well understood. Persons engaged in forming a railway are neither a corporation nor a trading partnership; they are merely a number of persons endeavoring to accomplish a particular object—that is to say, the establishment of a company, first for forming, and afterwards for working, a railway. If they incur expense in endeavoring to effect their object, and seek to render any one liable to any part of that expense, the question always is, whether that person whom they seek to charge did or did not authorize them to incur that expense on his account. Now this is a mere question of fact. If there

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had been no winding-up act, it would have been tried by an action at law; and in deciding whether any particular name ought or ought not to be placed on the list of contributories, what the court has to decide is, what ought to have been the result if such an action had been brought. Now, applying these principles to the present case, let us see what are the facts on which the master has placed Mr. Capper's name on the list of contributories. The evidence before him was, first, a printed prospectus of the projected company; secondly, a letter from Mr. Capper to the provisional committee, dated the 19th September, 1845, applying for shares, and agreeing to pay on what should be allotted to him a deposit of 2*l.* 12*s.* 6*d.* per share, and to sign the subscribers agreement and parliamentary contract; thirdly, the form of a letter of allotment of shares in the company, showing the allotment of thirty shares to him. Now I am of opinion, that if, after the abandonment of the project, an action had been brought by the promoters against Mr. Capper on this evidence, the judge would have been bound to direct a nonsuit, or to have told the jury there was no evidence warranting them to find a verdict for the plaintiffs — that the scheme having proved abortive, there was no contract to pay any money at all. For what are the facts? It does not even appear that Mr. Capper ever saw the prospectus; but if he did, it amounts to no more than this, that he was thereby made aware of the fact of a great number of persons having formed themselves into a committee for establishing the railway in question, with a certain capital and a certain number of shares; that this project had been previously registered under the 7 & 8 Vict. c. 110; and that all persons agreeing to take shares would be called on to pay a deposit of 2*l.* 12*s.* 6*d.* per share. With this information he applied for fifty shares, that is to say, fifty shares in the company to be formed, and in respect of which he was apprised he would eventually have to pay 25*l.* per share, if so much should be necessary, and would at the outset have to pay 2*l.* 12*s.* 6*d.* per share in part of the 25*l.* Let it be assumed that he engaged to make these payments, still, before he had paid any thing, the promoters with whom he had contracted abandoned the project. And how is it made out that he even agreed to pay any part of the 2*l.* 12*s.* 6*d.* for any thing else than as part of the purchase money for his shares in the concern? There is no evidence whatever leading to any such conclusion. The cases to which I was referred are all either clearly distinguishable from that now before me, or else distinctly establish my view of the subject. *Clements v. Todd*, 17 Law J. Rep. (N. S.) Exch. 31; 1 Exch. 268, was an action by a party who, though he had not signed the subscribers' agreement and parliamentary contract, had accepted scrip certificates on an express agreement that he should stand in the same situation as if he had signed those documents. It was admitted, that, if he had signed them, he would have been precluded from sustaining the action, which was an action to recover back the deposit on a total failure of consideration. He failed in his action, because it was shown, that, by the terms of the subscribers' agreement, if he had signed it, he would have authorized the application of his deposit to the payment of preliminary expenses;

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and what the court directed was, that he, by his express contract, stood in the same position as if he had signed the document. That case is evidently quite beside the present question. The next case was that of *Jones v. Harrison*, 17 Law J. Rep. (N. S.) Exch. 132; 2 Exch. 52, and there certainly the court held, that, in that particular case, the party who had paid his deposit on a scheme which proved abortive, could not recover back what had been reasonably applied by the directors towards the preliminary expenses of forming the company. But this decision furnishes no authority for the general proposition contended for in this case, because the court there proceeded entirely on the special nature of the contract there, which expressly stipulated that the directors should be at liberty to apply the deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking; and the court held, that by the words "the general powers vested in them" were meant the powers which they were then exercising in causing surveys to be made, and the like; so that, taking that to be (as I have no doubt it was) the true construction of the letter of allotment, the plaintiff had clearly precluded himself from recovering back his money. The next case is one entitled to very great weight, being a decision of the court of error. I refer to *Ashpitel v. Sercombe*, 19 Law J. Rep. (N. S.) Exch. 82, decided in February, 1850. In that case, the plaintiff, who was a member of the provisional committee, applied for 200 shares, undertaking to accept the same, or any portion thereof, to execute the subscribers' agreement and parliamentary contract, and to pay the deposit. The managing committee allotted to him only 100 shares, apprising him, as in the case now before me, that he must pay, by way of deposit, 2*l.* 12*s.* 6*d.* per share, and that he might have scrip for his shares on executing the subscribers' agreement and the parliamentary contract. The project was eventually abandoned, and the plaintiff brought his action to recover back his deposit. At the trial, before Cresswell, J., it was proved that very large expenses had been incurred by advertising and making necessary surveys, and otherwise; and it was also proved, that, by the subscribers' agreement, express authority was given to the managing committee to incur such expenses, but there was no evidence that the plaintiff knew of the contents of the subscribers' agreement, or that its terms were such as necessarily must be included in the agreement which he engaged to sign. The learned judge, at the trial, told the jury that if they were satisfied the project had been abandoned, the plaintiff was entitled to recover. To this the defendants tendered a bill of exceptions, and the jury having found for the plaintiff for the full amount of the deposit, the bill of exceptions came on for argument before the court of error. The court held, that the direction of the judge was right; that it was for the defendants to show by evidence that the plaintiff had sanctioned the expenditure of the deposit in outlay for preliminary purposes; and that the circumstance of his having accepted shares, paid the deposit, and agreed to sign the subscribers' agreement, (it not being shown that he was cognizant of the contents of the agreement, nor that the agreement to allow expenditure on

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preliminary expenses was necessary to be understood as forming part of the subscribers' agreement,) furnished no evidence of any authority to the directors to expend any part of his deposit on preliminary expenses. Now this was the unanimous decision of the full court, consisting of all the judges of the courts of queen's bench and common pleas, except the chief justices, and it establishes conclusively, that a person, by accepting shares and paying his deposit, does not thereby authorize the expenditure of any part of his deposit in the expense of forming the company. It follows, then, *a multo fortiori*, that no person, by merely agreeing to take shares and pay his deposit, enters into any agreement to contribute to any expenses incurred or to be incurred before the company is finally established. The only other authority to which I was referred was *Mathew's Case*, 14 Jur. 928: there undoubtedly Knight Bruce, V. C., may seem to have acted on a view of the law not in conformity to the cases I have just referred to. But I must remark that none of the authorities to which I have referred were brought before the court. The case was argued on the assumption, that Mathews was clearly liable as a contributory, unless he could establish a fraud on the part of the directors, on which he relied as exonerating him. His counsel never argued that he was not liable if there had been no fraud; and this course may have been quite advisedly pursued by them, for Mathews, in his letter asking for shares, agreed to be bound by the regulations of the company. If it was part of those regulations that the deposits should be applicable to preliminary expenses, and that was known to him, the doctrine of the cases at law would not apply, or rather it would be a case in which, according to the decisions in *Clements v. Todd* and *Jones v. Harrison*, he was bound to contribute to the preliminary expenses. These contradictions may well reconcile this case with the others. I must suppose, that on some such grounds as this the decision proceeded. I have now noticed all the cases to which I was referred, and so far from shaking the opinion I formed when the matter was before me, they strongly confirm me in it. What I have to decide is, as I have already stated, a question of fact rather than of law; and this court certainly may, and very often must, decide a fact for itself. But when it is once established as matter of law, that a given state of circumstances affords no evidence for a jury warranting them to find a particular result, it is certainly the duty of this court, when it has to say what is the legal result from that same state of circumstances, to arrive at the same conclusion. And applying this reasoning to the case now before me, I think, even if there were no other authority, (and there are many,) the decision of the court of error, in *Ashpitel v. Sercombe*, is conclusive. The only facts relied on here are the prospectus, the application for shares, with an agreement to pay the deposit, amounting to 10s. per 100l. beyond the sum required by the standing orders, and the allotment in performance of that application. Now, even assuming all these facts to be made out, still they all existed in *Ashpitel v. Sercombe*. But the court of error there held, that even though the applicant in that case accepted the shares and paid the deposit, yet there was no evidence of an agreement to allow the deposit to be

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expended in preliminary expenses. I am, therefore, clear that Mr. Capper's name ought to be erased from the list. The costs of the parties will come out of the fund.

EVANS v. PROTHEROE.¹

March 9 and July, 1850, and January 30, 1851.

Evidence — Unstamped Receipt — Collateral Matter — Costs.

Two issues were directed out of the court of chancery: one, whether E. R. had agreed to sell three tenements, adjoining the river T., to J. R.; the other was whether the purchase money had been paid. At the trial, an inadequately stamped receipt for 21*l.*, from J. R., "being the amount of purchase for three tenements sold by me adjoining the river T.," and signed by E. R., was received in evidence, and the jury found for the plaintiff on both issues. Upon a motion for a new trial on both issues, Wigram, V. C., thought that the document had been properly received in evidence upon the first issue, on the authority of *Matheson v. Ross*, 13 Jur. 307, and refused a new trial upon that issue, but granted a new trial on the second:—

Held, by Lord Cottenham, C., directing a new trial on both issues, that the document had been improperly received in evidence upon the first issue, "the fact of payment being one of the means by which the affirmative of that issue might be proved," and not collateral to the issue, as in *Matheson v. Ross*.

The costs of the defendants, who succeeded upon the appeal motion, were not mentioned in the judgment pronounced upon the motion, but the order delivered out gave costs against the plaintiff:—

Held, that the costs ought not to have been given against the plaintiff; but they were made costs in the cause.

THIS was a motion by way of appeal from an order of Wigram, V. C. The bill was filed by James Evans, as the executor of one Jenkyn Richards, against Henry Protheroe, alleging himself a purchaser from Thomas Richards, and against the said Thomas Richards, as the administrator of Evan Richards, and it alleged that Jenkyn Richards had purchased the leasehold property in question in his lifetime from his brother, Evan Richards. It stated that several proceedings had been taken at law in ejectments brought against the plaintiff by Henry Protheroe, on the demise of himself and Thomas Richards. The object of the bill was to restrain an action pending, and for specific performance of the alleged contract of purchase, the principal evidence of which was a receipt in the following words:—

"Received this 25th day of August, 1827, of Mr. Jenkyn Richards, now and before the sum of 21*l.*, being the amount of the purchase for three tenements sold by me adjoining the river Taff.

"Received the contents,

"Witness, John Swaine.

"EVAN RICHARDS."

At the original hearing two issues were directed by Wigram, V. C.: one, whether such agreement had been entered into; the other, whether

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the purchase money had been paid. The receipt was stamped with a 6*d.* stamp instead of a 1*s.* stamp, but it had also been stamped in the progress of the suit with a 1*l.* stamp, being the proper stamp for an agreement or conveyance. At the trial of these issues, before Platt, B., this document was received in evidence — [there were contradictory affidavits as to whether the objection of the insufficiency of the receipt stamp had been really taken at the trial; but both the vice chancellor and the lord chancellor appear to have thought that the objection had been sufficiently taken to allow of the point being raised upon the motion for a new trial] — and the jury found for plaintiff upon both issues. Upon a motion by the defendants for a new trial, before Wigram, V. C., his honor held, that, upon the authority of *Matheson v. Ross*, 13 Jur. 307, the receipt was evidence admissible upon the first issue as to the contract, but that it was not admissible as evidence of the payment of the purchase money; and he directed a new trial upon the second issue, but refused a new trial upon the first issue. Cross motions were now made to discharge the vice chancellor's order.

Walker, for the defendants, contended that there ought to be a new trial upon the first issue, for that this case was very different from the case of *Matheson v. Ross*, (since reported in 6 Bell's Ap. Ca. 374, and 2 H. L. C. 286;) that in that case there were two distinct parts of the documents — one showing, from the state of the account, that there was a balance of 68*l.* 9*s.* 4*d.*; and the other, the unstamped receipt for that sum of 68*l.* 9*s.* 4*d.*; but that receipt was wholly immaterial to prove the state of the account, which was the only question in issue in that case; but in the present case the payment of the money is in issue. He referred to the cases cited in *Matheson v. Ross*, and to *Doe v. Stagg*, 7 Scott, 690; 3 Jur. 1127.

The Solicitor General (Sir John Romilly) and *W. M. James*, for the plaintiff, contended that there ought not to be a new trial directed on either of the issues. They submitted that the receipt was properly admitted in evidence on the first issue, and that it was not required upon the second issue, for that the payment was proved *aliunde*; that this document cannot be given in evidence, either as an agreement or as a conveyance, although it also purported to be a receipt; that it was identical with *Matheson v. Ross*, for, as in that case, the unstamped paper was given in evidence to prove the state of the account only, so here it was only given in evidence to prove that the party sold three tenements adjoining the river Taff; and the receipt is no more required in this case to prove the payment of the 21*l.*, than was the receipt in *Matheson v. Ross* required to prove the payment of the 68*l.* 9*s.* 4*d.*: that suppose a receipt was in this form, "I received the 21*l.* for certain smuggled tobacco," could it not have been given in evidence to prove the breach of the revenue laws? — that the vice chancellor took this view of the case, and put several other supposititious cases, in which he thought that an unstamped receipt might be admitted in evidence, as, for instance, where a writing was intended to be a receipt, but in fact no money passed. They cited *Horsfall v. Key*, 17 Law J. Rep. (N. S.) Exch. 266.

Walker, in reply. In the case put by Wigram, V. C., the paper would clearly be evidence, because it never acquired the character of a receipt, the money never having passed.

[*Lord Chancellor*. In *Matheson v. Ross* there was nothing signed but the receipt. What I felt in that case was this — that there was no authority to show that, because evidence was to be rejected as a receipt, it not being stamped; therefore, it was to be rejected if tendered to prove some other collateral purpose. Have you any case prior to *Matheson v. Ross*, to show that that which is in the form of a receipt, but not stamped, is not to be used to prove some matter recited in that document?]

(*Doe v. Stagg*, ubi sup.)

The LORD CHANCELLOR (Lord Cottenham) delivered out the following judgment prior to relinquishing the seals: "It is with the greatest reluctance that I find myself under the necessity, in this case, of directing a new trial. The property is very small, the parties apparently very poor, but the litigation, both at law and in equity, must have been very expensive, and though long protracted, has, up to the present time, produced no satisfactory result. The issues were, first, whether Evan Richards had agreed to sell the property in question to Jenkyn Richards; and if he had, secondly, whether the purchase money had been paid. At the trial a paper was produced purporting to be a receipt for the purchase money, but it had not a proper receipt stamp. It seems doubtful how far the objection as to the stamp as a receipt stamp was raised, but the judge's notes prove that he had observed that there had been a 6*d.* stamp, which it is not contended was the proper stamp for the sum, that being 21*l.* The fact of the payment of the consideration money was a most important fact upon both the issues; upon the latter it was the whole question, and upon the first *it was one of the means by which the affirmative might be established*. The agreement might itself have been proved — a conveyance might have been proved — which would have assumed, and so proved, the agreement; or payment of the consideration money might have been proved, which might have assumed the fact of the agreement.

Upon both issues, therefore, *the fact of payment* was of the utmost importance, and went directly to the matter in issue; and if the document in question was properly received in evidence, and the jury were right in giving credit to it as genuine, the conclusion of the jury in favor of the plaintiff could not, with any prospect of success, have been disputed. But the question is, was the receipt, not being upon a proper receipt stamp, receivable upon those issues? It had been rejected at a former trial by Wightman, J., but was received upon the last trial by Platt, B., and it was contended before me that it could not have been received to prove payment of the money; that the object in this case was not to prove such payment, but an object quite collateral, namely, to establish the fact of the agreement; and a recent case of *Matheson v. Ross*, 1 H. L. C. 286; s. c. 13 Jur. 307, was relied upon for this distinction. I have carefully examined that case. The House of Lords proceeded upon the ground that the paper there in

Evans v. Protheroe.

question, though there was upon it a receipt for a balance, as also a statement and settlement of accounts, was quite unconnected with the fact whether the balance had or had not been paid, which was not in question in the cause; and the house thought, that, for the purpose of showing the state and balance of the account, the paper might be received, this being altogether collateral to the object and purpose of the paper as a receipt: and I find that I am reported as having qualified my opinion in favor of the admissibility of the document by these observations: 'Most of the cases go to show this—that in a particular instance the matter to be proved is the payment of money, and the payment is to be proved by the production of a written document, of an acknowledgment of payment, or what is called a receipt. The stamp acts immediately apply to such documents so produced, and for such a purpose, whether it is for the direct purpose of proving payment as a discharge between debtor and creditor, or whether it is for an indirect and collateral purpose, as to show some right in, or advantage belonging to, a party in consequence of such payment; where, for instance, a matter collateral is to be proved by the proof of the fact of payment, and the fact of payment is established by a receipt, such a case is clearly within the provision of the stamp act. This, however, is not the present case.' It is, however, the case now under my consideration. The object of producing the document is to prove the fact on the issue called collateral, namely, the agreement, by proof of the fact of payment; and the fact of payment is attempted to be established by a receipt not having a proper stamp. It appears to me, therefore, that within and upon the principle of the case quoted, the document ought not to have been received; and as I cannot doubt but that the verdict of the jury was much influenced by the document, I am compelled to send these issues to another trial."

January 30, 1851. Lord Cottenham's judgment said nothing as to the costs of the motions; but, in drawing up the order, the registrar's clerk gave the defendants their costs as against the plaintiff. The order was now spoken to upon the minutes.

W. M. James submitted, that, Lord Cottenham not having said any thing as to the costs, the order should be silent upon them.

Walker, contra.

The LORD CHANCELLOR (Lord Truro) (after consulting Mr. Colville, the registrar) said, that he understood the practice to be, that in all these cases the costs are asked for; but that if they are asked for, and the order pronounced does not mention them, that does not enable the registrar to include the costs: that, upon exceptions, costs follow the result, if nothing be said upon them; but that it is not so in appeals; that nothing having been said about the costs, he was of opinion that the proper thing would be, that the defendants' costs should be costs in the cause.

Ordered accordingly.

Loder v. Arnold.

LODER v. ARNOLD.¹

November 4, 1850.

Injunction, Breach of—Motion to commit—Costs.

Parties claiming to be equitable mortgagees in possession of certain freehold houses, commenced pulling down the wall of one of them. The party claiming to have the legal estate thereupon filed his bill against the equitable mortgagees, and obtained, *ex parte*, an injunction to restrain them from pulling down, destroying, or damaging the houses or buildings, and from removing or carrying away the bricks or materials thereof, and from doing or committing any waste, injury, or spoil to, in, or upon the premises, or any part thereof. The plaintiff afterwards put workmen into the houses, who excluded the defendants by shutting the doors and windows. The defendants thereupon obtained an entry by breaking a window in one of the houses, broke the lock of one of the doors, and ejected the plaintiff's workmen:—

Held, that, under the circumstances, no breach of the injunction had been committed.

Held, also, that the defendant was entitled to costs, although he had been guilty of personal violence in obtaining possession.

In this case the plaintiff, Robert Loder, had obtained, *ex parte*, an injunction, dated the 29th November, 1849, to restrain the defendants, Thomas Arnold and William Allen, from pulling down, destroying, or damaging the houses or buildings standing or being on the piece of land in the plaintiff's bill mentioned as belonging to the plaintiff, and situate in the parish of South Hincksey, in the county of Berks, and from removing or carrying away the bricks or materials of the said houses or buildings, and from doing or committing any waste, injury or spoil to, in, or upon the said premises, or any part thereof. The present application was, that the defendants may be committed to the queen's prison for breach of the injunction. The plaintiff, by his bill, alleged that he had the legal estate in, and was in possession of, the land and premises in question; but the defendants, by their answer, filed subsequently to the date of the injunction, denied that the plaintiff had either such legal estate or possession, and averred facts which showed that the defendants were equitable mortgagees by deposit of title deeds, in possession of the premises. From the circumstances stated in the answer, and in the affidavits filed in support of, and in answer to, the present application, it appeared that the houses in question were, at the date of the injunction, in an unfinished state, having neither doors nor windows; that the defendants had been employed to build the houses by one James, who had deposited with them one of the title deeds, with a memorandum of deposit, as a security for money due to them for building the same. James subsequently absconded in debt to the defendants, who thereupon, with a view to find out the legal owner of the premises, commenced pulling down part of the wall of one of the houses. The plaintiff then filed his bill, and obtained the injunction above mentioned, which was duly served upon the defendants, who thereupon ceased from pulling down the wall. The defendants also abstained from proceeding to complete the houses, which were not in an inhabitable state, but endeav-

¹ 15 Jur. 117.

Loder v. Arnold.

ored to retain their possession by leaving some of their materials on the premises and by visiting the houses occasionally. In the month of April last, after their answer had been filed, the defendants, on visiting the houses, found some workmen of the plaintiff at work upon the premises; and the defendants thereupon caused a notice to be served upon the workmen not to in any manner interfere with the property, or go thereon, under any excuse or pretence whatsoever, or they would be deemed wilful trespassers, and proceeded against by law accordingly. On the 5th June last, the defendants again visited the premises, and at that time there were no doors or windows in any of the houses, which were still in an unfinished and uninhabitable state. On the 10th June, the defendants paid another visit to the premises, when they found the plaintiff's workmen again at work on them, and the doors and windows had been put up, and which were then locked and fastened; and on demanding admittance, the defendants were informed by the workmen that they had been ordered by the plaintiff not to let them in; and the defendants were refused admission. On the afternoon of the same day, the defendants again visited the premises, when the workmen again locked the doors and fastened the windows, and refused to admit the defendants into the houses, and the defendants thereupon broke some panes of glass in a back window of one of the houses, and by that means obtained an entry into the house, and ejected the workmen. The defendants also visited the premises on the following morning, the 11th June, when they found the doors and windows closed and fastened, and they again obtained an entry through the window, and ejected the workmen. The plaintiff, on the 14th June, served the defendants with notice of the present motion. The plaintiff's affidavits, filed in support of the application, stated that the defendants had used great personal violence in ejecting the workmen, and had committed damage to the houses to the amount of from 2*l.* to 4*l.* in value. The defendants' affidavits, on the contrary, stated that the defendants had used no more personal violence than was absolutely necessary for the purpose of ejecting the plaintiff's workmen, and that the amount of damage did not exceed 6*s.* 6*d.*, and had been fully repaired.

Bethell and *Shebbeare*, in support of the motion, contended that there was a clear breach of the injunction, and that the defendants ought, therefore, to stand committed. The plaintiff denied that the defendants had ever been in rightful possession of the premises; but even admitting that they had been, still it was in vain for the defendants to set up as a defence to the motion, that they had been improperly deprived of their possession by the plaintiff, and that they had only committed such damage and violence as enabled them to regain the possession, of which they had been surreptitiously deprived, for they ought to have proceeded to regain their possession in a legal manner, and not by acts of violence. The damage done may have been trifling, but still there was a breach of the injunction, which was, to restrain the defendants from doing or committing any waste, injury, or spoil to, in, or upon the premises, or any part thereof.

Field v. Titmuss.

ROLFE, V. C. The court must have regard to the circumstances under which, and the object for which, the injunction was obtained. The injunction was, in fact, obtained for the purpose of retaining the defendants from pulling down or destroying houses. It does not appear to me that any breach of the injunction has been committed. The injunction was granted to restrain the defendants from destroying or damaging the houses in question; but the only damage done by the defendants was very trifling, and just so much as enabled them to re-obtain that possession of which they allege the plaintiff had surreptitiously deprived them. I am of opinion that I must refuse the motion; but I question whether I can give the defendants their costs, as it appears that they have been guilty of very improper acts of personal violence.

W. W. Cooper, who appeared for the defendants, was heard on the question of costs.

Shebbeare, in reply, on the same question.

ROLFE, V. C. On consideration, I do not see what the charge of violent conduct on the part of the defendants has to do with the question before me, which is simply, whether or not there has been a breach of the injunction. I am of opinion that there has not been a breach of the injunction committed, and therefore refuse the motion, with costs. If the defendants have been guilty of unnecessary violence, the parties complaining may have their remedy elsewhere.

FIELD v. TITMUSS.¹

February 9, 1851.

Practice — Creditor's Suit.

In a creditor's suit, though the plaintiff's debt has been disputed by the defendant and established by the court, the usual decree will be made, and the creditor must prove his debt in the master's office.

This case is fully stated in his lordship's judgment.

Bethell and Forster, for the plaintiff.

Rolt and Elmsley, for the defendant.

LORD CRANWORTH, V. C. In this case, the original suit was an ordinary creditor's suit against the defendant as executor of William Titmuss, the plaintiff having been the solicitor of the testator in his

¹ 15 Jur. 121.

Field v. Titmuss.

lifetime. The debt on which the plaintiff relied was a written memorandum subscribed by the testator at the foot of an account consisting of the amounts of several bills of costs, by which memorandum the testator admitted the correctness of the bills, and agreed to pay interest thereon. The defendant having in his answer disputed the debt, the plaintiff examined several witnesses, who proved the testator's signature to the memorandum; there was no other evidence. The defendant filed a cross bill, impeaching the genuineness, or at all events the fairness, of the document so signed, or alleged to have been signed, by the testator; but he did not go into evidence, and the whole equity of the cross bill was denied by the answer. The two causes came on for hearing together, and I was of opinion that the plaintiff in the original suit had made out his demand, so as to entitle him to a decree, and that the plaintiff in the cross bill had wholly failed; I therefore dismissed the cross bill, with costs; and the only question is, what is the decree to which, under these circumstances, the plaintiff is entitled. Mr. Bethell, on his behalf, contended, that though, in general, the common decree of a creditor's suit merely directs a general account of all debts, leaving to the plaintiff in common with other creditors the obligation of establishing his demand in the master's office, yet that the rule was different where the plaintiff's demand had been disputed, as it was in this case, and established by evidence; but I find no authority for this distinction, and, on the contrary, Lord Cottenham, in *Owen v. Dickinson*, Cr. & Ph. 56; 4 Jur. 1151, speaks of the obligation of the creditor to prove his debt over again before the master, although he may have *established* it here, as being the settled practice of the court. The words "though he may have established it here" seem clearly to point to the case of its having been disputed by the executor; for in every creditor's suit the plaintiff creditor must of course prove his debt, otherwise he would not be entitled to a decree at all; and it never was doubted but that, in an ordinary case, the plaintiff, like every other creditor, must establish his debt in the master's office. It was argued, indeed, that the language attributed to Lord Cottenham in the case I have referred to could not really have been used by him; but I see no reason, so far, at all events, as relates to that part of the report, to doubt its accuracy; and it was afterwards relied and acted on by Wigram, V. C., who had been counsel in the cause of *Woodgate v. Field*, 2 Hare, 213; 6 Jur. 871, and some other cases; and is, so far as I can discover, in strict conformity with the general practice. I confess I was struck, at the hearing, with the argument, that such a course is not to be reconciled with the general doctrine, which, in the absence of fraud or collusion, makes the executor in any proceeding against him by one creditor, at law or in equity, the sole party to sustain the rights of the other creditors, who may be interested in resisting the debt sued for. If, for instance, in the present case, the plaintiff had sued the executor at law and recovered judgment, that judgment would be conclusive proof of his debt in a subsequent suit for administering the assets. And I presume the same force must be attributed to a debt established by decree of this court

In re Walker, and in re The Manchester and Leeds Railway Company, &c.

in a suit by a single creditor suing on his own behalf only, not seeking a general account, but merely proceeding to establish a demand against the executor, to be paid by him out of the assets, in a due course of administration. And reasoning by analogy from such cases, it is not obvious why the same force is not to be attributed to the proof of a debt, in a suit for general administration of the assets in payment of all the debts. But it may be observed, that in the latter case, what the plaintiff asks is merely that an account should be taken of what is due to himself and the other creditors, and then that the assets may be applied ratably in discharge of all the demands. A decree, therefore, which should not oblige the plaintiff to come in with the other creditors and prove his debt, would not be in conformity with the relief he asks, for it would be a decree placing him in a position different from that of the other creditors, made in a suit in which all he has asked is, that he and the other creditors should all be put on the same footing. Whether this be the ground of the rule or not I need not inquire. The principle and the practice seem to me to be perfectly well settled; and, therefore, the decree here must be the ordinary decree, directing the master to take an account of what is due to the plaintiff and the other unsatisfied creditors of the testator.

*In re ANN WALKER, a Lunatic, and in re THE MANCHESTER AND LEEDS RAILWAY COMPANY and THE LANDS CLAUSES CONSOLIDATION ACT, 1845.*¹

January 25, 1851.

Railway Company — Costs — Heir at Law of Lunatic — 8 Vict. c. 18, s. 80.

The costs of the heir at law of a lunatic, attending the master upon a reference regarding the taking of a portion of the lunatic's land by a railway company, ordered to be paid by the company.

THE only question upon this petition was, whether the railway company was to bear the costs of the attendance before the master, of the heir at law of the lunatic, upon a reference as to the taking by the railway company of some of the land of the lunatic. The question turned on the 80th section of the Lands Clauses Consolidation Act, 1845.

Walpole, for the committee of the estate, cited *Re Taylor*, 1 Mac. & G. 210.

Murray, for the heir at law.

Bacon, for the company, admitted their liability to pay all the costs

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of the reference, except the costs of the heir at law; but he submitted that his attendance before the master not having been rendered necessary by the circumstance of the company requiring to take the land, but by the circumstance of the lunacy, the company ought not to be ordered to pay those costs.

LORD CHANCELLOR. It is clear that the legislature intended that a lunatic's estate was not to be fixed with costs by reason of a railway company taking the lunatic's land; and whether the estate would be charged directly or indirectly would not be of much consequence—the result would be the same. Now, the justice of the case is, that the lunatic's estate should be kept clear of all expense, which it would not have incurred had the company not become the purchasers of his land. The statute directs “the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof,” to be paid by the company. Now, undoubtedly, looking at the course of practice in lunacy, the heir at law was a proper party before the master, and his costs are such as were incurred in consequence of the taking of the land.

Costs of the heir at law to be paid by the company.

POTTER v. BAKER.¹

February 25, 1851.

Construction of Will—Perpetual Annuity.

A testator charged on his freehold house an annuity to E. P. for 50*l.* a year, for her and her three children, and after her decease he directed the money to be paid to each of them as they should attain twenty-one, but if either of them should die, to be paid to the survivor:—

Held, that this was a gift of a perpetual annuity of 50*l.* to E. P. and her children, and the survivor of them, and that they were entitled to have such a sum raised, by sale or mortgage, as would produce 50*l.* per annum.

WILLIAM HAWKINS, by his will, dated the 11th April, 1822, bequeathed as follows: “I appoint Mr. Thomas Baker and Edward Wallis my executors; that as soon as possible after my decease, that my freehold house, known by ‘The Red Lion,’ in Parliament Street, Westminster, in the county of Middlesex, be let on lease, at the option of my executors, for the space of twenty-one years or thirty-one, which may be able in proportion to get the most money for. In the next place, I leave each of them, my executors, 10*l.* each, and all the money arising from good will, fixtures, plate, china, glass, and all other effects producing from my said freehold; and after all my just debts and funeral expenses are paid, then my executors shall put the money into the funds, to the best advantage, for them who I shall hereafter name. The first is my daughter, Mary Ann Wiseheart; I

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give to her 50*l.*, and to be paid her half yearly so long as she lives, and her receipt only shall be a discharge to my executors; and after her decease, then that 50*l.* per year shall go, one half to Elizabeth Luckhurst, and the other half to Mary Ann Ballard, who now resides with me here, who I shall name after. In the next place, my executors will give, as a token of respect for my late wife, to L. Bromley, 10*l.* for mourning. In the next, I give to Jonn Lemon my silver tortoiseshell snuffbox, but if he should die before me, I then give it to Henry Steeres. In the next place, I give to Elizabeth Luckhurst, of No. 10 Brook Street, Lambeth, 50*l.* per year, for she and her three children, and after her decease the money shall be paid to each of them as they attain the age of one and twenty; but if either of them die, to be paid to the survivor. In the next place, I give all my remaining property to Mary Ann Ballard, whatever it might produce, either from the rent of the house or money in the funds, and she shall remain in the house till it is let, if she thinks proper; and after one year I wish the house to be sold to the best bidder, and the money to be put in the funds, and Mary Ann Ballard to receive the produce of it, and the money to be divided after her decease amongst her four children, or any more she may have in my lifetime, share and share alike, as they come to the age of twenty-one." Elizabeth Luckhurst had three children, and she, after the testator's decease, married John Potter. She died in August, 1848. By the decree of Lord Brougham, C., dated the 2d May, 1831, reversing the decision of Sir John Leach, M. R., it was declared that the good will and rent of the testator's freehold house, mentioned in his will, were subject to the charges created by his will. A petition was now presented by the three children of Elizabeth Potter and Henry Scarth, their assignee, alleging, that under the will of the testator, and the several indentures in the petition mentioned, the petitioner Henry Scarth was entitled to an annuity of 50*l.* per annum in perpetuity, charged on the real estates of the testator, and to have the annuity raised and paid or secured to him in such manner as directed by the will, and for that purpose to have such a sum of 3*l.* per cent. bank annuities as would be sufficient to produce an annuity of 50*l.* per annum, raised by sale or mortgage of the testator's freehold house, and transferred to the petitioner; and the petition prayed in conformity with such allegation.

Turner, Selwyn, and Wakefield supported the petition, and contended that the language used by the testator amounted to a gift to the children of Elizabeth Potter, of an annuity of 50*l.* in perpetuity; and that the petitioner Scarth, as their assignee, was entitled to have such a sum of money raised, by sale or mortgage, as would, if invested, produce 50*l.* per annum. When the testator intended to give an annuity for life, he had, in the case of Mary Ann Wiseheart, used apt and proper words for that purpose. They cited *Robinson v. Hunt*, 4 Beav. 420. *Stokes v. Heron*, 9 Jur. 563; 12 Cl. & Fin. 161. *Yates v. Maddon*, 16 Sim. 613; 13 Jur. 331. *Blewitt v. Roberts*, Cr. & Ph.

Leathart v. Thorne.

174; 10 Law J. Rep. (N. S.) Chanc. 342. *Rawlings v. Jennings*, 13 Ves. 45. *Phillips v. Chamberlayne*, 4 Ves. 54.

Roupelle v. Follett, contra, for the residuary legatees and heir at law, cited *Hedges v. Harper*, 9 Beav. 479; 10 Jur. 578.

Lloyd and *S. Atkinson*, for other parties.

LORD LANGDALE, M. R., observed upon the language of the will, and expressed his opinion that the petitioners were entitled, under the will, to a charge on the testator's freehold house for such a sum as would produce 50*l.* a year.

LEATHART v. THORNE.¹

January 15, 1851.

Practice — Parties — Next of Kin.

On a bill filed by some next of kin, on behalf of themselves and all others, the court directed some evidence to be produced to show that the others were inconveniently numerous, before the decree should be drawn up.

THE bill was filed by four of the next of kin of a testator, (who, as to certain parts of his property, died intestate,) on behalf of themselves and all other the persons entitled, under the statutes of distribution, to the residuary personal estate of Thomas Leathart, deceased, praying various accounts, and the administration of the estate.

J. Parker and *Josiah Smith*, for the plaintiffs, stated that it was proposed to take an inquiry as to the next of kin. Those persons were very numerous, amounting in all to not less than fifty. There was not any evidence of that fact, but it would appear on the report in answer to the proposed inquiry.

KNIGHT BRUCE, V. C. Some evidence must be produced of that fact. The late act (13 & 14 Vict. c. 35) enables the court to receive an affidavit; and, therefore, if an affidavit be produced to the registrar that the next of kin exceed twenty in number, the decree may go. If that is not done, the whole next of kin must be brought before the court.

W. P. Wood, *Berkeley*, *Pownall*, and *Ware* appeared for the defendants.

¹ 15 Jur. 162.

Lock v. Lomas.

LOCK v. LOMAS.¹

January 18, 1851.

Foreclosure Suit — Assignees of Tenant for Life — Disclaimer — Costs.

In a foreclosure suit, brought by mortgagees against, amongst other parties, the assignees of a tenant for life who had executed the mortgage deed, the assignees, by their answer, stated, that before and since the filing of the bill they had offered to the plaintiffs to disclaim by deed, and they disclaimed by their answer:—

Held, that the assignees were entitled to their costs.

THIS was a foreclosure suit, instituted by the plaintiffs (who were first mortgagees of a term of years under the will of Isaac Wheeldon) against Lomas, the surviving trustee of the term, against subsequent mortgagees, and against, among others, Jacob Connop and K. M. R. Tarpley, the assignees of John Benton, a tenant for life subject to the term, who had joined in the mortgages, and had become insolvent. The bill prayed the common foreclosure decree. The defendants, Connop and Tarpley, by their answer, said, "that before the bill was filed, and also since the filing thereof, they had offered to the plaintiffs to disclaim by deed all, if any, the interest of the defendants in the estate devised by the testator to the said John Benton, and in all and every the subject matter of the suit, but which their offers had been refused by the said plaintiffs." They also disclaimed by their answer in the usual form. On the cause coming on to be heard on bill and answer,—

Wood, (with whom was Baggalay,) for the plaintiffs, said, that he understood that the defendants, Connop and Tarpley, asked to be dismissed, with costs. He read the passage above referred to from the answer, on which they founded their claim, and argued that it was not sufficient to entitle the defendants to their costs; that, though they said they had offered to disclaim by deed, they did not say they had offered to pay the costs of disclaiming, and the plaintiffs were entitled to a disclaimer at the cost of the defendants. He also suggested that they could not read their own answer.

Drewry, for the defendants, Connop and Tarpley, was not called upon.

Knight Bruce, V. C., referred to the rule, that a defendant may read his answer on a question of costs, and was of opinion that the allegation in the answer was sufficient to entitle the defendants to their costs.

Bill dismissed as against them, with costs, accordingly.

Lyne v. Pennell.—Watson v. Young.

LYNE v. PENNELL.¹

December 11, 1850.

Practice — Parties to Supplemental Suit.

If, after decree in an interpleader suit, it becomes necessary to file a supplemental bill, the original plaintiff is not a necessary party to it.

THE original bill in this case was for an interpleader, one of the defendants being the official assignee of a bankrupt. A decree was obtained in the suit, and then the official assignee died. A supplemental bill was filed by one of the other defendants against the new official assignee alone. On the supplemental suit coming on for hearing,—

Rolt and *Prior* objected that the plaintiff in the original suit ought to be a party.

J. Parker and *Dean* contended that he had no interest, and need not be a party. *Bignall v. Atkins*, Mad. 369.

ROLFE, V. C. In interpleader suits, as soon as the plaintiff has got a decree there is an end of him, and the defendants are in the anomalous position of plaintiff and defendant. I think, therefore, that I may make a distinction between this case and the case of other suits, because, in truth, in an interpleader suit, one of the defendants is the plaintiff. I should be unwilling to rest this decision upon any other consideration than this; but I think, upon the reasons I have given, I may make a precedent.

Objection overruled.

WATSON v. YOUNG.²

December 13, 1850.

Claim — Parties.

THIS was a claim filed by some of a class of residuary legatees against the executors for an account, it appearing from the will that there were others.

Greene, for the claim.

Bates, for the executors, submitted to the court whether it was not necessary that all the residuary legatees should be parties to the claim.

ROLFE, V. C., thought it was not necessary, as all could be summoned before the master.

 Simmons v. Rudall.

SIMMONS v. RUDALL.¹

December 4, 1850, and February 8, 1851.

Will — Residue — Lapse — Statute of Limitations — Interlineations.

A testator gave his residuary real and personal estate to trustees, upon trust, after the death of C, as to one fourth, as C should appoint, and upon trust to divide the rest and residue between other persons. Soon after his death, a suit was instituted for the administration of his personal estate, which continued for twenty-five years after his death, when C died without making an appointment:—

Held, that the one fourth went to the heir

The heir was made a party for the first time at the death of C:—

Held, that he was barred by the lapse of time from disputing the validity of the devise to the trustees.

In the will were erasures and interlineations in the handwriting of the testator:—

Held, in the absence of evidence, that they must be taken to have been made after the execution, and to be void, as related to the real estate.

BENJAMIN THOMAS made his will, dated 24th June, 1815, as follows: "And as to all worldly goods which it hath pleased God to bless me with, I give and dispose thereof as follows: After paying my just debts, funeral expenses, &c., I give and devise unto Katherine Simmons, of Castle Street, Leicester Square, all my freehold messuage or tenement and premises, with the appurtenances and land thereto belonging, at Weston Grove, in the parish of Thames Ditton, in the county of Surrey, now in the occupation of Adam Reid Gardener, during the term of her natural life, to and for her sole and separate use and benefit, and not to be subject or liable to the debts, control, or interference of any husband with whom she may intermarry, and her receipt and receipts only to be a discharge for the rents and profits of the said premises. And from and after her decease, I give and devise the same unto John Simmons of the same place, to hold to him and his heirs forever: provided always, and my will and meaning is, that *in case the said John Simmons shall happen to depart this life intestate, or under the age of twenty-one years, without leaving any issue of his body lawfully begotten, before the demise of his said mother, then and in such case I give and devise the said freehold estate, premises, and land, together with all the rest, residue, and remainder of my real and personal estate and effects, of what nature or kind soever, unto John Cowell, of Water Lane, and Thomas Bradley, of Mark Lane, both in the city of London, merchants, and the survivors of them, and the heirs, executors, and administrators of such survivor, upon trust, that they or the survivor of them shall and do place the moneys that shall arise from my personal estate and effects out at interest on public or private securities, and from time to time pay, apply, and dispose of the yearly interest and produce thereof, together with the yearly rents, issues, and profits arising from and out of my real estates, when and as the same shall become due and payable, and be received by them,*

¹ 15 Jur. 162.

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or either of them, into the proper hands of Sarah Armstrong, of Winchester Row, Paddington, in the county of Middlesex, widow, for and during the term of her natural life; and from and after her decease, upon trust to pay and apply the said yearly interest, dividends, increase and produce rents, issues, and profits into the proper hands of Isabella, daughter of the said Sarah Armstrong, for and during the term of her natural life, for her own sole and separate use and benefit, whose receipt and receipts alone shall be sufficient discharges to the person or persons paying the same, notwithstanding her coverture; to the intent that the same may not be at the disposal of, or subject or liable to the control, debts, or engagements of any her husband, but only at her own sole and separate disposal, as if she were sole and unmarried. And from and immediately after the decease of the survivor of them, Sarah Armstrong, and Isabella her daughter, upon trust that the said trustees, or the survivor of them, his heirs, executors, and administrators, do and shall pay, convey, assign, and transfer one equal fourth part of the said trust moneys, together with the interest and dividends, increase and produce thereof from thenceforth to accrue and grow due thereon, and also of the said residue and remainder of my real estate, unto and to the use and uses of such person or persons, and to such intent and purposes, as the survivor of them, the said Sarah Armstrong, and Isabella, her daughter, shall, in, and by her last will and testament give, devise, and bequeath the same; and upon further trust to divide, convey, assign, and transfer all the rest, residue, and remainder of the said trust moneys and real estate unto and to the

and Maria

use and uses of Katherine [^] Cutting, daughter, of Thomas Cutting and Maria Cutting his wife, of Rushmore, in the county of Suffolk;
 Mary Anne

[^] Rose Bradley, daughter of Thomas Bradley, of Mark Lane aforesaid, and John Simmons, before mentioned, their heirs, executors, administrators, and assigns, equally between and among them, share and share alike, at their respective ages of twenty-one years; but in case

and Maria Cutting, Mary Anne

any one or more of them, the said Katherine Cutting, [^] Rose Bradley, and John Simmons, shall depart this life before her, or his, or their distributive share thereof shall become payable and transferable as aforesaid, then upon trust to pay, convey and transfer the share or shares of her, him, or them dying, equally among the survivor or survivors, share and share alike, together with their original shares of the said principal money and real estates; in the mean time, and until their said respective distributive shares thereof shall become due and transferable, to pay and apply the said interest and profits equally and among them from the time of the decease of the survivor of them, the said Sarah Armstrong, and Isabella, her daughter." The will was executed by the testator, and attested by three witnesses, and a pen had been run through the word "Rose" in both places. At the foot of it were the following words: "N. B. — The above alterations respecting Maria Cutting and Mary Anne Bradley were made by me. B. Thomas." The whole of the will and alterations were in the testator's handwriting. He made a codicil to his will, and died in 1820.

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Sarah Armstrong died in 1823, and shortly afterwards Isabella Armstrong married John Cutting. In 1826, a suit was instituted for the administration of the testator's personal estate, in which various proceedings were from time to time taken. Isabella, the wife of John Cutting, died in 1846, without having executed the power of appointment given to her by the will over the one fourth, and thereupon a question arose, whether the testator did not die intestate as to that one fourth of his residuary estate, or whether that one fourth did not form part of the ultimate residue. A suit was accordingly instituted, supplemental to the former suit, and Thomas Williams, the heir at law and next of kin, who was not known at the time when this last suit was instituted, was afterwards brought before the court by a supplemental bill, in order to litigate the question as to the one fourth. At the hearing, the heir at law claimed all the residue of the real and personal estate as undisposed of in the event which happened, of John Simmons having attained the age of twenty-one, and outliving his mother. The third question argued was to the effect of the erasures and interlineations.

Bethell and *Daniel*, for the plaintiff, John Simmons, contended that there was, on the construction of the will, no intestacy as to the residue; *Doe v. Brazier*, 5 B. & Al. 64; and that, if there was, the heir was bound by the lapse of time. *Davenport v. Coltman*, 9 M. & W. 481; 11 Law J. Rep. (N. S.) Exch. 114.

Rolt and *Freeling*, for the heir. The heir is clearly entitled, on the words of the will, to the residue. 1 Jarm. Wills, 144. The operation of the statute of limitations is prevented by the fact of the suit having been instituted. The heir at law ought to have been a party to the original suit, but in fact knew nothing about it. He is now brought here, and claims the same rights as if he had always been a party. The heir, seeing the court in possession, does not think it necessary to interfere, but leaves his interest to the protection of the court. There is no pleading of the statute. *Lancaster v. Evors*, 10 Beav. 154; 16 Law J. Rep. (N. S.) Chanc. 8. As to the erasure and alterations, *Knight v. Clements*, 8 Ad. & El. 215; 2 Jur. 395, parties relying on them must be able to account for them. 1 Jarm. 119. *Rydal v. Wager*, 2 P. Wms. 328.

Malins, *Rudall*, *Bird*, *R. W. Moore*, *Speed*, *G. W. Collins*, and *Torriano* for other parties.

Daniel, in reply. The bill is supplemental as to the personalty, but original as to the realty. The heir is brought here to contest his right to the one fourth undisposed of by the death of Isabella Cutting, without appointment, and not to set up any claim adverse to the will.

LORD CRANWORTH, V. C. There is a great deal in this case which I must take time to consider; but there is one point as to which I have no doubt. I must treat the whole as having been devised to

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trustees; and the suit was instituted about twenty-five years ago, alleging them to be trustees of the real estate under this will, and of course implying them to be in possession. The trustees, I presume, appeared, and admitted they were in possession; but that would not bind the heir at law, and he might have at any time brought his ejectment. The suit administered the trusts, and so it went on till the time when it became necessary to have the heir at law a party before the court, in order to ascertain whether, on the true construction of the will, certain trusts had not been trusts, in the events that have happened, for the benefit of the heir at law; and to litigate that, he must be heard. He, being before the court, says, what he might have said all along at law, "You have construed this erroneously; it was undisposed of by the testator, and I might have entered upon it at any time since 1820." That may be true, and if we were now at the end of nineteen years, and within the time when the heir at law might have been at liberty to assert this question, it would be my duty, and I must not have prevented him from asserting his legal right adversely to all these parties; but it has so happened that the heir at law was not here, and did not litigate it until the period when it has become impossible to litigate it. It is conclusive, and he is bound by the lapse of time. He suggested, indeed, that the filing a bill might preserve his rights; and certainly all those who claim under the will have their rights preserved; but it is quite a novelty to say that filing a bill can preserve the rights of parties claiming adversely to the will. This, therefore, relieves me from considering whether the case comes within the category of *Doë v. Brazier*, 5 B. & Al. 64, and *Davenport v. Colman*, 11 Law J. Rep. (N. S.) Exch. 114; 9 M. & W. 481, in which, I think, that was the great distinction. That is not the only question in this case, and I have now only to deal with the case as one in which I am to decide who are entitled to the proceeds of the real and personal estate, according to the trusts of this will. Some very important questions arise as to erasures and interlineations, much of which arises from the conclusion to which I may arrive as to the time when the erasure was made. If I see my way in what is contended by Mr. Malins, that the alterations were made before the execution of the will, I shall have no doubt about the case. Suppose a man makes an alteration in the presence of the witnesses, and then executes the will. I have yet to learn that these alterations would be invalid merely because he did not make a marginal note to that effect. I have great difficulty in understanding the 21st clause of the wills act, 1 Vict. c. 26, which says, "that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent;" that is, if you can say what it was before it was altered, it has no effect, "unless such alteration shall be executed in like manner, as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof"—(What does "such alteration" mean? Does it mean, an alteration subsequent to the making of the will?)—"shall be deemed to be duly executed

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if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration." That is hardly necessary, if the party making the alteration signs the will, and it is witnessed after execution. But if it is meant that the alteration was made before the will is executed, is it not to be valid without a note of it? That never can be in the contemplation of the legislature. It is very proper that there should be a note in the margin; but suppose all the witnesses see it was so, and yet it was not noticed, is it not to be part of the will? That leads me to consider what is the effect of striking out the name of Rose Bradley, and what is the effect of inserting the names of Katherine Cutting and Mary Anne Bradley. As to those matters I desire time before giving my opinion, and also as to the gift of the residue.

February 8, 1851. LORD CRANWORTH, V. C. This case was heard before me at the sittings after last Michaelmas term. The question argued was as to the construction of the will of Benjamin Thomas, dated on the 21st or 24th June, 1813. The will so far as it need be stated, is as follows: In the first place, the testator, after giving to Katherine Simmons a freehold house at Weston Grove for her life, proceeds thus: "And after her decease," &c. [His lordship read the passage.] Three points were made. In the first place, the heir at law contended that there was no devise at all of the real estates to the trustees, for that the devise to them was not to take effect except on the event, which did not occur, of John Simmons dying without issue, intestate, in the lifetime of his mother. I decided, however, against the heir at law on this point. The contingency as to the death of John Simmons was clearly meant to apply only to the devise of the house at Weston Grove, and not to the other real estates. Besides, as I intimated at the time of the argument, the title of the devisees, as between them and the heir, is not in question in this cause. If they have not a good title against the heir, then he has an adverse legal title, which he may assert by ejectment. On this point I entertained no doubt. There were, however, two other points. The first, what was the effect of the erasures, alterations, and interlineations upon the devise of the realty: and, secondly, Sarah Armstrong and Isabella her daughter having died without exercising the power of appointment given to the survivor over one fourth of the trust property, did that fourth become part of the residue given to the other residuary legatees? With respect to the first of these points, the first matter to be considered is as to the interlineations. When were they made? If made before the execution of the will, the substituted parties would take; if made afterwards, there would be no devise to them valid according to the statute of frauds. With a view to the determination of this point, I requested to be informed when Mary Anne Bradley, whose name is substituted for that of Rose, was born; for if her birth had been subsequent to the execution of the will, it would of course have followed, as a

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necessary consequence, that the substitution of her name must have been subsequent to that execution. It turns out, however, according to the information furnished to me a few days before the end of last term, that Mary Anne Bradley was born in or before the year 1805, so that the date of her birth does not necessarily prove when the alterations were made. I am, therefore, obliged to recur to general principles, and to decide what is the legal presumption as to an interlineation, when there is no evidence, internal or external, to show whether it was made before or after the execution of the will. In the case of deeds, the authorities seem to show that where there are interlineations, the presumption is, that they were made before execution. See Mr. Butler, note 7, Co. Litt. 35, b.; also Vin. Ab. "Faits," 410; and some other cases referred to in Ph. Ev. 470, note 3, 8th ed. And this is consistent with good sense, for every deed expresses the mind of the parties at the time of its execution; and so, if altered afterwards, it would be fraudulent, and in many cases highly criminal. The presumption, therefore, is, that no alteration has been made. But in the case of wills this reasoning does not apply. A will is intended to indicate the mind of the testator at the moment of his death; and so it is, in the language of the law, ambulatory, and may well, consistently with its object, be altered from time to time, as often as the mind and wishes of the testator are changed. It is, therefore, plain, that in the case of a will, the reasons for presuming every interlineation to have preceded the execution, which prevail in the case of deeds, do not exist.

In a recent case, before the privy council, *Cooper v. Bockett*, 4 Moo. P. C. 449; 10 Jur. 931, the judicial committee decided, where there were interlineations, but no proof as to when they were made, that probate must be granted of the will as it stood before the interlineations. Their lordships held, that they could not presume them to have been made before the will was executed. This decision proceeded on the 21st clause in the last wills act, 1 Vict. c. 26, which enacts *inter alia*, that no interlineation made in any will after the execution thereof shall have any effect, unless the alteration should be executed in the manner required for the execution of the will. The effect of this clause is to put an interlineation as to a bequest of personalty, on the same footing on which an interlineation as to realty stood before the statute; and the decision, therefore, of the judicial committee, though relating, of course, to personal estate only, furnishes an authority, the principal of which is applicable to every will, whether of real or personal estate. By that authority I should have felt bound, even if I had not agreed with the reasoning on which it proceeded. But it seems to me to be founded on the strictest principles and good sense; and acting on it, I must consider the insertion of the names of Mary Anne Bradley and Maria Cutting to have been made after the date of the will, and so to be inoperative as to the real estate. It remains to consider what is the effect of the erasure of Rose Bradley. I do think it had no effect at all. In the first place, I have no difficulty in coming to the conclusion, as matter of fact, that the erasure of the name of Rose, and the interlineation

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of that of Mary Anne, were contemporaneous acts. If the erasure of Rose's name was made, as possibly it might have been made, in her lifetime, it was clearly made only for the purpose of substituting the name of Mary Anne; and as that object could not be carried into effect, the original intention in favor of Rose must be deemed to continue unchanged. On the other hand, if (as was probably the case) the name was erased after her death, and because she had died, then I think the mere erasure of her name would show no more than that the testator was aware of her death; and so that the proviso he had made to take effect on that event, namely, the gift over of her share to John Simmons and Katherine Cutting, would come into operation; and, at all events, no effect was meant to be given to the act of erasure, unless at the same time effect could be given to the insertion of the name of Mary Anne. For these reasons I think, that, in the events which have happened, John Simmons and the defendant Katherine Isabella Cutting, who is the person in the will, called Katherine Cutting, became entitled, on the death of Isabella Mary Cutting, in the will called Isabella Cutting, daughter of Sarah Armstrong, in equal moieties, to three fourths of the real estates devised to the trustees. A doubt occurred to me, on looking at the will, whether John Simmons and Mrs. Rudall took more than life interests in Rose's third, for the want of words of inheritance in the gift over; but I think that doubt is unfounded; the language of the gift over, so far as relates to it, is upon trust to convey the share of her so dying — that is, of Rose — equally among the survivors, share and share alike, together with their original share of the real estate. What the trustees are to convey is the share of Rose's share — in what? I think, clearly, by the context, the share of the real estate; and these words are sufficient to carry the fee simple. The only remaining question is as to one fourth of the real and personal estate, over which Isabella Mary Cutting had power of appointment, which she did not exercise. On behalf of the devisees of the other three fourths it was argued, that it passed to them under the words "all the rest, residue," &c. But I think this is not a legitimate construction of the language used. The testator subjects one fourth of his estate, real and personal, to the appointment of the survivor of the tenants for life, and then gives the rest and residue, after their deaths, to others. The words are as follows: [His lordship read them.] I think this passage must be read as if the words had been, "all the real and personal estate, except the one fourth subjected to the appointment of Sarah Armstrong and her daughter." The consequence is, that, as to one fourth, there is an intestacy, and Thomas Williams, whom the master has found to be now heir at law and the personal representative of the sole next of kin of the testator, will be entitled to that fourth.

In re Parkinson.

*In re PARKINSON.*¹

January 30, and February 12, 1851.

Will — Family.

Direction in a will, that the residue, after the death of the tenant for life, should be equally divided among a testator's five sisters and their respective families:—

Held, a gift of one fifth to each of the sisters and her children living at the death of the testator as joint tenants.

ROBERT PARKINSON, by his will, dated the 12th March, 1808, directed his executors and trustees to lend out the residue and remainder of his estate and effects to good, or reputed good, security or securities, the interest annually arising from which principal sum or sums to be paid annually to his wife, Agnes Parkinson, so long as she should continue his widow and in a state of chaste viduity, and at her decease, or her sooner nonconformity to the said last-mentioned clauses and injunctions, the said principal sum to be equally divided, share and share alike, among his five sisters, Elizabeth, Ann, Isabella, Dorothy, and Elmina, and their respective families, if any. The testator died in September, 1808, leaving his wife and his five sisters surviving him. The wife died in 1849, and thereupon the trust fund was paid into court by the then trustees. Four of the testator's sisters were married before his death. The date of the marriage of the fifth, who could not be found, was said to be about forty years ago. Some of the daughters had children born during the life of the testator, and some had children born after his death, but during the lifetime of the tenant for life. One of the sisters and the representatives of another now petitioned for payment of one fifth to each.

T. J. Phillips, for the petitioners, cited *Robinson v. Waddelow*, 8 Sim. 134; *Wood v. Wood*, 8 Jur. 266; 3 Hare, 65; and *Beales v. Crisford*, 13 Sim. 592; 7 Jur. 1076.

Shebbeare, for the children alive at the death of the testator, cited *M' Leroth v. Bacon*, 5 Ves. 166; *Barnes v. Patch*, 8 Ves. 604; and *Woods v. Woods*, 2 Jur. 818; 1 My. & C. 401: as to the joint tenancy, *Buffar v. Bradford*, 2 Atk. 220; *De Witte v. De Witte*, 11 Sim. 41; 4 Jur. 625; and *Sutton v. Torre*, 6 Jur. 234.

Elderton, for the children born after the death of the testator, cited *Froggatt v. Wardell*, 14 Jur. 1101.

Nalder, for the trustees.

Phillips, in reply, cited *Crockett v. Crockett*, 2 Ph. 553; 11 Jur. 98.

February 12, 1851. LORD CRANWORTH, after stating the case, said,

¹ 15 Jur. 165.

In re Parkinson.

that three constructions had been contended for. On behalf of the petitioners representing the sisters, it was argued that the gift must be read as if it was a gift to them in fifths. Mr. Elderton contended that each of the sisters took an estate for life, with remainder to her children born during the lifetime of the tenant for life; and Mr. Shebbeare, on behalf of the children born at the death of the testator, contended that it was a gift to the widow for life, with remainder to the five sisters as to each share, and to such children as should be living at the death of the testator as joint tenants. Mr. Phillips, on behalf of the sisters alone, contended that the word "family" must be rejected; he relied particularly on the case of *Robinson v. Waddelow*, 8 Sim. 134, before the vice chancellor of England, in which that word was rejected. I cannot say that that case is quite satisfactory to my mind, but I think it went on the specialty of the language. I see that I was counsel in it, but I cannot recollect any thing about it. I do not quite follow the reasoning, and I cannot agree, if it is meant to say that the word "family" is to be always rejected, and I do not think I can act upon it. Mr. Phillips insisted that there were no cases, except *Beales v. Crisford*, 13 Sim. 592; 7 Jur. 1076; and *Wood v. Wood*, 3 Hare, 65; 8 Jur. 266, in which the court had given effect to the word "family." But there is a case before Lord Hardwicke, and the case of *Barnes v. Patch*, 8 Ves. 604, before Sir W. Grant, in which it is said that the word meant children. So in *Wood v. Wood*, 3 Hare, 65; 8 Jur. 266; and the only question is, whether there is any difference where the gift is to the parent and family. In *Woods v. Woods*, 1 My. & C. 401; 2 Jur. 818, Lord Cottenham held that the gift for the benefit of a woman and her family gave the children an interest. So in *Beales v. Crisford*, in which, however, the will was so strangely worded, that it can hardly be said to be an authority. I do not think I can reject these words as unintelligible. In common parlance, in speaking of a woman and her family, her children are meant. We find that none of the sisters had been married above six or seven years, and therefore could have no family except children. I think it is obvious, that what he meant was his sisters and their children. That consideration decides not only against Mr. Phillips, but also against Mr. Elderton. His construction would have been a very good will, but not the will that was made. He might have given to his sisters for life, with remainder to their children, but that he has not done. On this point, *Froggatt v. Wardell*, 14 Jur. 1101, was cited, but I cannot rely upon that case, nor would the learned judge who decided it say it was any authority, as it depended upon such nice specialties, that it cannot govern any other case. The result of my consideration, therefore, is, that the estate must be divided into fifths; and as to each fifth, each sister, and such children as were living at the death of the testator, take that one fifth as joint tenants.

Newbury v. Marten.—*Ex parte* Lawes, &c.

NEWBURY v. MARTEN.¹

February 20, 1851.

Foreclosure — Infant — Costs.

THIS was a claim for foreclosure against the devisees of the mortgagor, one of whom was an infant. The infant not having appeared, the plaintiff obtained an order appointing the solicitor to the fee fund his guardian. The claim now came on to be heard.

Stevens, for the plaintiff, proposed to take a decree, not reserving to the infant defendant a day to show cause, relying on sects. 7 and 8 of the trustee act, 1850, by which the court is empowered, by order, to transfer the estates of infants.

LORD CRANWORTH, V. C., however, was of opinion that the plaintiff had a right to have the common decree of foreclosure, with a day for the infant to show cause. There was nothing in the trustee act to alter the rights of the infant.

Taylor, for the infant, asked that the costs of the solicitor to the fee fund might be taxed and paid by the plaintiff, and added to the debt. This was not the practice generally in foreclosure suits, but this was a peculiar case, as the solicitor only appeared for the convenience of the plaintiff.

LORD CRANWORTH, V. C., thought that that ought to be done.

Ex parte LAWES, *in re* THE VALE OF NEATH AND SOUTH WALES BREWERY JOINT-STOCK COMPANY.²

January 16, 1851.

Joint-stock Companies Winding-up Acts — Contributory — Void Sale of Shares.

A shareholder in a joint-stock company sold his shares to a trustee on behalf of the company, taking, pursuant to a resolution of the company, a loan note, at a certain rate of interest, at five years' date. A regular certificate of transfer was given, and entry made of the substituted shareholder's name:—

Held, that (in accordance with the decision in *Morgan's Case*³ of the late lord chancellor) the vender of the shares was still a contributory, without qualification.

THIS was an appeal motion, made on behalf of Mr. John Lawes, the executor of Mr. William Lawes, from the decision of Master

¹ 15 Jur. 166.

² 15 Jur. 185.

³ 1 Mac. & G. 225. 13 Jur. 665.

Ex parte Lawes, in re The Vale of Neath & South Wales Brewery Joint-stock Co.

Brougham, by which Mr. John Lawes was placed on the list of contributors to the Vale of Neath and South Wales Brewery Joint-stock Company, in respect of thirty shares, without qualification. The facts appeared to be as follows: On the 21st August, 1844, William Lawes was the holder of thirty shares in the company; and by an indenture of that date, and made between William Lawes, of the first part, W. H. Buckland, of the second part, and John White Little and William Brunton, two of the trustees of the company, of the third part, William Lawes, in consideration of 450*l.*, stated to be paid to him by W. H. Buckland, assigned these thirty shares to W. H. Buckland, his executors, administrators, and assigns. On the 13th November, 1844, a certified extract from the share-register book of the transfer of thirty shares by William Lawes, who was then deceased, to W. H. Buckland, was delivered by the secretary of the company to John Lawes, as such executor, signed by Mr. Rusher and Mr. Buckland, two of the directors. This certificate was given pursuant to the fortieth section of the deed of settlement, which was in the following words: 40. "A book, to be called the 'share-register book,' shall be kept by the secretary of the company, in which shall be entered the names and additions of the several proprietors for the time being of shares in the capital and property of the company, together with the number of the shares which they shall respectively have therein; and the proprietors for the time being shall be entitled to copies, by way of certificate, signed by two of the directors for the time being, of the entries relating to their respective shares in the said share-register book; and such copies or certificates so signed shall, as between the proprietors of the company, be conclusive evidence of the entries of which they purport to be copies."

By the forty-fourth clause of the deed of settlement, provision was made for the cessation of the responsibility of shareholders upon transfer or forfeiture of their shares. Mr. John Lawes, besides taking this certified extract, required to see the original entry in the share-register book, and it was therefore exhibited to him. On the 10th of April, 1844, an extraordinary general meeting of the company had been convened, at which the following resolution was passed: "That if any shareholder shall be desirous of withdrawing from the company, the directors shall be at liberty to purchase his shares, at a price not exceeding 15*l.* per share, on his investing, or procuring to be invested, an amount not less than the purchase money for his shares, and taking the loan note of the company for five years, at 5*l.* per cent. interest, for such investment, together with the purchase money for his shares; but in case of preference shares being so purchased by the company, the same shall be taken at a price not exceeding 20*l.* per share, and not less than a corresponding amount be introduced."

The transfer of the 21st August, 1844, had been made to Mr. Buckland, a director and nominee of the company, in pursuance of this resolution. The consideration, mentioned in the deed as being paid, was not, in fact, paid to Mr. Lawes, but a loan note for 900*l.* was given to him, in the following terms:—

Ex parte Lawes, in re The Vale of Neath & South Wales Brewery Joint-stock Co.

"Loan Note, No. 27. — £900. — Entered, William Lowther.

"Vale of Neath Brewery, Neath, August 21, 1844.

"On the 21st day of August, 1849, we promise to pay to the order of Mr. William Lawes the principal sum of 900*l.*, and interest on the same, half yearly, at the rate of 5*l.* per centum per annum.

"For the Vale of Neath and South Wales Brewery Company.

"W. H. BUCKLAND, }
 "J. W. LITTLE, } Directors.

"Payable, when due, at Messrs. Drewett & Fowler's, London."

This consideration of 900*l.* was composed of 450*l.*, the purchase money for the shares, and 450*l.* money lent by Mr. William Lawes to the company, in pursuance of the resolution of the meeting of the 10th April, 1844.

Roundell Palmer and Lewin, for the motion. In *Ex parte Morgan*, 1 Mac. & G. 225; 13 Jur. 665, Lord Cottenham, C., decided (reversing the decision of this branch of the court) that this company was not bound by the purchase of shares in pursuance of the resolution at the meeting of April, 1844. Still, admitting the authority of that decision, the present case is distinguishable from it, as here there has been a regular entry of the transfer in the share-register book, and also of the name of the substituted shareholder. Of this the whole company must be taken to have had notice, and to have acquiesced in it. *Walford v. Adie*, 5 Hare, 112. The transfer was more than six years before the order for winding up the company was made, and therefore the statute of limitations applies to all liabilities on account of the company's debts at that time. As to the shares, it is a question between Buckland and the company, and not between Mr. Lawes and the company. [They cited also *Hollwey's Case*, 1 De G. & S. 777; 13 Jur. 954; *Richmond's Executors' Case*, 3 De G. & S. 96; 13 Jur. 726, and *Langstroth v. Toulmin*, 3 Stark. 145.]

Russell and Terrell, for the official manager, were not called on.

Knight Bruce, V. C. There may be, and possibly are, specific differences between this and *Morgan's Case*; but my impression is, that the late lord chancellor decided *Morgan's Case* on a ground common to that and the present case, namely, that the intention of all the parties in the transaction of the transfer was, that the shares should be assigned to the company, that is, to a trustee of the company as a trustee; and that such a transaction cannot be maintained, unless the purchase by a director for the company was made according to their rules. I find a distinction in *Hollwey's Case*, 13 Jur. 954, on the ground that the legal formalities had been pursued, and it was not brought home to the party transferring that he knew or intended it to be with the company. The motion must be refused, but the costs must come out of the estate.

Hawkins v. Gathercole.

HAWKINS v. GATHERCOLE.¹

December 7, 1850, and January 11, 1851.

Privileged Communications.

H. advanced money to G. on the security of certain property recently purchased by G., D. being solicitor to both parties. H. afterwards filed his bill, alleging that the property was insufficient, and that there had been fraud and collusion between G. and D.:—

Held, that letters which had passed between G. and D. with reference to the purchase and to the mortgage were not privileged.

THE bill in this case was filed on the 19th January, 1850, by William Hawkins against the Rev. Michael Augustus Gathercole, G. R. Dodd, and others. It stated that prior to August, 1845, G. R. Dodd was the solicitor for Gathercole, and acted as such solicitor in the purchase of the advowson of Chatteris Nuns, in June, 1845; that in May, 1845, the plaintiff applied to Dodd to invest 24,500*l.* for him on eligible freehold security by way of mortgage, and that Dodd recommended the above-mentioned advowson of Chatteris Nuns; that in carrying out this mortgage transaction, Dodd acted as solicitor both for the plaintiff and for Gathercole; that by an indenture of the 3d August, 1845, Gathercole conveyed the said advowson to the plaintiff, with a proviso, that if Gathercole should pay the plaintiff on the 8th August, 1852, the said sum of 24,500*l.*, with interest, then the plaintiff would reconvey the advowson to Gathercole; and in the said indenture were contained powers of sale in case of default in payment of the principal or of the interest; and there were the usual covenants for title. The bill further stated, that at the time when the loan was negotiated, Gathercole was an entire stranger to the plaintiff. The bill charged, that in the month of December, 1846, the plaintiff, for the first time, discovered that Gathercole had purchased the advowson, for the sum of 16,000*l.*, from the Rev. Robert Chatfield, then vicar, and of the age of sixty-nine; (Chatfield appeared to have died or resigned in the year 1845, and Gathercole to have presented himself, as Gathercole was in the bill styled incumbent of the living of Chatteris Nuns; see S. C., 14 Jur. 1103;) that in 1845 Gathercole was of the age of forty-six, or thereabouts; that Dodd was well aware of the value of the advowson, and knew that it was not a sufficient security; that Dodd allowed the plaintiff to advance his money in pursuance of a scheme entered into between the plaintiff and Dodd; that various communications passed between Gathercole and Dodd in relation to procuring this advance of money, from which it would appear that Dodd was well aware of the inadequacy of the security; and the bill prayed an account of what was due to the plaintiff, and that the advowson might be sold and the proceeds paid to the plaintiff, and the deficiency made up by Gathercole and Dodd; and also for the removal of Dodd, who had been appointed under certain deeds receiver of the tithes and rents. The defendant Gathercole, by his answer, said that

¹ 15 Jur. 186.

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he had in the first schedule set forth a full list of the letters which had passed between him and Dodd in reference to the purchase of the said advowson and the subsequent mortgage thereof, which were then in his possession or power, but said that all the said letters were confidential communications made by Dodd to the defendant in his character as defendant's solicitor, and submitted that such letters were privileged communications, and that he ought not to be called upon to produce the same. The plaintiff now moved for production of the documents.

Bethell and *S. Smith*, in support of the motion, cited *Walsingham v. Goodricke*, 3 Hare, 122.

Roxburgh (*Rolt* with him, absent) opposed. The letters between Gathercole and Dodd can have no reference to the sale asked for in this suit, and could not be demanded even if there were no question as to privilege. They are privileged as between Gathercole and Dodd, his solicitor. They may be material in respect of the relief prayed against Dodd, but not against us. *Herring v. Cloberry*, 1 Ph. 91; 6 Jur. 202.

Bethell, in reply.

LORD CRANWORTH, V. C. The bill in this case was filed by a gentleman named Hawkins against the defendant Gathercole and others for the purpose of impeaching the mortgage of the advowson, on the ground of fraudulent collusion to represent that it was of greater value than it really was. These were the circumstances of the suit: The advowson had been a short time before purchased by Mr. Gathercole from a gentleman named Chatfield; and Mr. Gathercole, being himself a clerk, presented himself, and then afterwards raised money by means of mortgage, or raised it before. Of course much correspondence would have passed between him and his solicitor, both during the purchase and at the time of the mortgage. He is called upon to produce the documents, and says he has in the first schedule set forth a full list of the letters which had passed, but that such communications were confidential, and made by Dodd to the defendant in his character of the defendant's solicitor. In this case I think I am relieved from the necessity of making much inquiry on the subject, because this is the very case decided by Sir J. Wigram, V. C., in *Walsingham v. Goodricke*, 3 Hare, 122. That learned judge was very adverse to extending the doctrines of production, but the authorities bound him, whatever his own opinion might be. What took place there was this: A negotiation was opened between a person professing to be the agent of Goodricke and the agents of Lord Walsingham, whereby Goodricke contracted to sell the estates to Lord Walsingham. Negotiations and correspondence took place by the intervention of the agents; and so far as Dowbiggin, who was alleged to be Goodricke's agent, was concerned, the price was settled, abstracts were delivered, and further correspondence took place. Then, at the

 Thomas's Trust. — Robinson's Trust.

close of the year 1842, the defendant's solicitors, finding perhaps a defect in the titles, intimated that they found they could not complete the matter, that nothing bound them, and that, if any question arose, Lord Walsingham must take such measures as he might be advised. The bill was filed for specific performance, and the defendant admitted that he had a great deal of correspondence which passed in that year between them, and Sir J. Wigram, V. C., ordered production of the correspondence, except of so much as the parties should state on oath passed after the first day when the dispute arose. Now, here no letters seem to have passed after the dispute arose. No point is raised that any such passed, and I must make a general order for production.

 THOMAS'S TRUST.¹

February 7, 1851.

Practice — Trustee Act.

In this case, certain persons interested, being desirous of having new trustees appointed of certain articles of settlement, had exhibited a statement before a master, under the 13 & 14 Vict. c. 60, s. 38, and the master had given a certificate approving of certain persons as new trustees, all parties interested having appeared before him and consented.

Hetherington, on behalf of the persons exhibiting the statement, now moved that the certificate might be confirmed, and that an order might be made appointing the persons approved of by the master trustees of the articles of settlement. The other parties interested did not appear, and the question was, whether it was necessary for them to do so, as they had already consented before the master.

LORD CRANWORTH, V. C., thought they must appear and consent, and made the order on the production of consent brief from the other parties.

 ROBINSON'S TRUST.²

February 12, 1851.

New Trustee.

A new trustee will be appointed by the court without a reference, on proof of his fitness, and on his consent.

Waldron v. Sloper.

THIS was an application for the appointment of a new trustee in the place of a retiring trustee, under the trustee act, 1850. The retiring trustee refused to join in appointing a new trustee under the powers in the deed creating the trust, which rendered this application necessary.

Prendergast, for the petitioners, read an affidavit of the fitness of the person proposed to be appointed, and that he had verbally consented to the appointment.

Prior, for the retiring trustee.

LORD CRANWORTH, V. C., thought that the new trustee ought to appear and consent, and suggested that he might have been joined as a petitioner; but, subject to the production of his consent, his lordship made the order appointing the new trustee, and directing a transfer of the funds, without a reference to the master.

WALDRON v. SLOPER.¹

February 20, 1851.

Short Claim — Costs.

THIS had been set down on the certificate of the plaintiff's counsel as a short claim.

Bethell and *Rogers*, for the plaintiff, opened the case.

Stuart objected that it could not be a short claim.

LORD CRANWORTH, V. C., was of the same opinion, and said that it must follow what he understood to be the practice in short causes, and that the costs of the parties brought here ought to be paid by the party setting it down, but desired the registrar to certify as to the practice. (See *Hills v. Treacher*, which occurred later in the day.)

Shapter, *G. M. Giffard*, and *T. Wood* appeared for different parties.

¹ 15 Jur. 187.

 BENYON v. NETTLEFOLD.

BENYON v. NETTLEFOLD.¹

December 11 and 12, 1850.

Discovery — Immoral Consideration — Action at Law — Pleading.

A bill for discovery in aid of a plea, pleaded by the plaintiff in equity to an action by a trustee upon a covenant entered into by the plaintiff in equity for the payment of an annuity to the plaintiff at law, upon trust for one C. N., stated that the deed of covenant was valid on the face of it, but that the consideration for it was a prospective illicit cohabitation subsequently had between the plaintiff and the said C. N., which had been since discontinued, and that discovery of the true consideration was necessary for his defence at law. Demurrer for want of equity by the plaintiff at law overruled, no discovery being sought which could by possibility subject him to pains and penalties.

Although, where a bill is for discovery and relief, it may be demurrable, yet where it is for discovery only, in aid of a defence at law, it will not be demurrable, unless the discovery would infringe upon some known rule.

THIS was an appeal from an order of the late vice chancellor of England, allowing a demurrer to the plaintiff's bill of discovery. The bill stated, that in the month of December, 1847, the plaintiff indiscreetly executed a certain indenture, dated the 14th of that month. The bill stated the indenture in *totidem verbis*, from which it appeared that the plaintiff, being desirous of making a provision for Caroline Nettlefold, spinster, agreed with the defendant, W. Nettlefold, to grant an annuity of 200*l.*, to be paid to her for her natural life; and that in pursuance of that agreement, and in consideration of the sum of 10*s.* by the said defendant paid to the plaintiff, the plaintiff granted an annuity of 200*l.* to the defendant, W. Nettlefold, during the life of the said Caroline Nettlefold, for the separate use of the said Caroline Nettlefold, and covenanted for the due payment thereof. The bill then stated, that the said indenture was valid on the face of it, and that the consideration, as appearing by the said deed, was free from legal objection; but that the fact was, that the consideration for the said deed was a prospective illicit cohabitation and improper connection subsequently had between the plaintiff and the said Caroline Nettlefold, and that the said deed was invalid; that after the execution of the said deed, the plaintiff, seeing the impropriety of the said connection, and finding himself duped, broke off and discontinued the same altogether; that the said defendant well knew that the consideration for which the said deed was executed by the plaintiff was immoral and illegal; nevertheless, he had recently commenced an action at law to recover the arrears of the said annuity; that the plaintiff put in a plea to the said action, to the effect that the said deed was executed and delivered by the plaintiff to the said William Nettlefold, in consideration of the said Caroline Nettlefold then agreeing with the plaintiff unlawfully and immorally to cohabit and commit fornication with the plaintiff, and for no other value or consideration whatever; that in order to prove the truth of his said plea, and defend the said action, discovery of the matters aforesaid was necessary. The

¹ 15 Jur. 209.

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bill prayed discovery accordingly, and that in the mean time the defendant, W. Nettlefold, might be restrained from proceeding with his said action. To this bill, the defendant, W. Nettlefold, demurred, for want of equity. The vice chancellor of England allowed the demurrer, being of opinion that the plaintiff having effected his immoral purpose, and obtained that for which he stipulated, the court ought not to interfere to compel discovery; drawing a distinction between the present case and that of *Sismey v. Eli*, 13 Jur. 480, where the plaintiff had withdrawn from the agreement before cohabitation. (The case is reported 13 Jur. 798.) The plaintiff now appealed from the order allowing the demurrer.

Wood and Bird, in support of the appeal. A defendant in an action at law is always entitled to discovery in equity to enable him to defend the action, unless the defendant in equity can show some right of exemption from the rule, on the ground of penalties, or otherwise. Suppose that, instead of an action at law upon the deed, the trustee or Miss Nettlefold had filed a bill in this court for relief, there can be no doubt but that Mr. Benyon would have been entitled to set up the immoral consideration, and the court would have assisted him in making out that defence. *Knye v. Moore*, 2 Sim. & S. 260. The same principles must be followed, whether the discovery is sought in aid of a defence at law or in aid of a defence in equity; for this court never does indirectly what it would refuse to do directly; and it would never say to the trustee in the present case, "We will dismiss your bill if you file it for relief, yet if you bring your action, we will prevent the other side from setting up the defence which must have succeeded against your bill should you have filed it." It is a matter of course to give the discovery, unless it would subject the party to penalties. Lord Redesdale mentions six cases in which discovery will not be granted, Mitf. 150, 3d ed., the fifth and sixth of which are the most important. 5th. "That the discovery, if obtained, cannot be material." 6th. "That the situation of the defendant renders it improper for a court of equity to compel a discovery." First, then, is not this discovery material to the defence? *Collins v. Blantern*, 2 Wils. 341, settles this in the affirmative. Secondly, is the defendant so circumstanced as to protect him from the discovery? We submit that there is no pretence for saying that he is asked any thing that could criminate himself. It does not follow, that because, had the plaintiff filed a bill to have the deed delivered up, upon the ground of the immoral consideration, it would have failed, therefore, where the bill is only for discovery in aid of the defence to the action, the discovery will be denied. This distinction between a bill for relief and discovery consequent upon the right to relief, and discovery only, is very clearly recognized. *Thorpe v. Macauley*, 5 Mad. 218, 230; and on appeal, *Macauley v. Shackle*, 1 Bligh, N. S. 96, 127. They also referred to *Batty v. Chester*, 5 Beav. 103. *Sismey v. Eli*, 13 Jur. 480. *Lovndes v. Taylor*, 1 Mad. 423. *Hawkins v. Hall*, 1 Beav. 73; 3 Jur. 282. *Wilnot v. Maccabe*, 4 Sim. 263.

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Rolt and Hare, contra. There is no such distinction between bills for relief and bills for discovery as has been contended for by the other side, and we submit that any thing that will support a demurrer to a bill for relief will support a demurrer to discovery only. Lord Redesdale says, "Every bill is in reality a bill of discovery," &c. Mitf. 53, 4th ed. If this court will refuse to be active where relief is asked, it will also refuse to be active where discovery is sought in aid of a defence at law. The fact of there being an action at law pending will overrule many objections to a bill, but not all objections. The circumstance of a suit pending is only one of the circumstances to be considered in deciding the right to discovery. Mitf. 157, 185, 4th ed. The sixth case mentioned by Lord Redesdale, and referred to by the other side, points precisely to a case like the present, namely, that the court will not assume jurisdiction to compel discovery; and the present is one of those cases in which this court will say, if you have given a right at law, let the court of law take its course. The question, in fact, is, Will this court alter the legal rights? For giving discovery is altering the legal rights, and it is granting relief. *Wigram on Discovery*, 5, pl. 10. *Lord Montague v. Dudman*, 2 Ves. sen. 397. *Parkhurst v. Lowten*, 1 Mer. 391. The real question is, Is the court asked for assistance? The other side admit, that if the bill asked the least relief a demurrer would have held. The only case cited by the other side that requires any comment is the case of *Macaulay v. Shackle*, but that case only shows that the court will look at the fact that the discovery is sought in aid of the action at law, and will judge whether it is proper to assist the party in equity. It is not because a plaintiff in equity is a party defendant to an action at law that he will obtain discovery, but because he wished to set himself right by proving his justification. There are two answers to this bill: first, the discovery sought is immaterial; secondly, there is good ground in equity for refusing to give discovery even if it should assist the defence at law. First, it is true, that in many cases you may show the illegal consideration as an answer to an action, as in *Collins v. Blantern*, but this principle seems only to extend to cases where the consideration is against public policy or statute law. What argument, as to public policy, is there in the present case in favor of the defence to the action, which may not be urged tenfold against the defence? Is a man, who seduces a woman by means of giving such a deed as the present, to be assisted in defeating that deed after he has gained what he gave the deed for? *Walker v. Perkins*, 3 Burr. 1568. It is doubtful what would be the decision of a demurrer to the plea at law. *Sharp v. Taylor*, 2 Ph. 801. *Thomson v. Thomson*, 7 Ves. 470. *Turner v. Vaughan*, 2 Wils. 339. *Ward v. Lloyd*, 13 Law J. Rep. (n. s.) C. P. 5; 6 Man. & G. 785. Secondly, it is clear, that where a person, circumstanced like the plaintiff in equity, comes into equity for any relief, the court of equity refuses it. *Franco v. Bolton*, 3 Ves. 368. *Sismey v. Eli*, ubi sup. This must be held to flow from the latter case, that if immoral conduct had resulted from the contract, the decision of the vice chancellor of England must have been different from what it was.

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Wood, in reply. I submit that there is a clear distinction between bills for relief and bills for discovery merely. The real point is this: Is not the equity for discovery very different from an equity for relief? In the former you have only to show the court that there is an action pending in some court of civil process, in defence to which discovery is required. This is what is laid down in Mitf. 185, 186, 4th ed. In *Batty v. Chester* there was relief asked in a technical sense. In *Franco v. Bolton* the discovery asked would have subjected the defendant to ecclesiastical censures. *Sharp v. Taylor* makes against the argument of the other side. Although a bankrupt, or an alien enemy, cannot sue, yet if he be sued, he may have relief in equity.

[*Lord Chancellor*. The principle as to a bankrupt and an alien enemy is this, that he is supposed incapable of having property, but as soon as he is made a defendant at law he is treated as one having property, and may come here.]

Our equity is not that we have entered into an immoral contract, and ask to be relieved; but we say we are sued at law upon this contract, and we want discovery to prove our defence. *Wilmot v. Maccabe*, 4 Sim. 263. There is no allegation on this bill, nor any interrogatory, as to any act of the defendant which could tend to criminate him.

LORD CHANCELLOR. It appears to me that, both upon principles and authorities, this demurrer must be overruled. The objections to this bill, which is filed by a party for discovery to aid his defence at law, are—first, that he has no defence at law; and, secondly, that the manner in which he has stated upon his bill his plea at law is not an answer to the declaration. First, as to the point whether the party has a defence at law. It is suggested that that question is open to so much doubt, that I ought to send the case to a court of law; and I should do so had I any doubt upon the point, but I have no doubt whatever upon it. Upon principle it is clear, that if a man be sued at law upon a contract, and that contract be embodied in a deed, or rest merely in parol, it is competent to him to plead matter which shows that the contract was founded upon an illegal consideration. That is so well settled in the case of *Collins v. Blantern*, that it is not now arguable. As to the statement of the plea, I think it is sufficient: it is not necessary in a bill of this description to set out the plea in such a manner as would prevent a special demurrer at law—it is only necessary to show the subject matter of the plea; and here it is stated in distinct terms, that the bond was given in pursuance of an agreement for future cohabitation, and that that was an immoral consideration, and a good defence at law. If there was any objection to the form of the plea, I think we should have heard of a demurrer at law instead of here. The first point, therefore, falls to the ground. A good deal has been said as to the principle of the case, and the question of morals, and as to how far defences of this description should be favored in point of law. The law, in sanctioning a defence upon the ground of the illegality of the contract, does not aid that defence to favor the party urging it, but to prevent its being

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made the medium of enforcing that illegal contract: if courts of law did not allow such a defence, it would be tantamount to allowing contracts for living together in a state of illicit cohabitation. I do not think that the tone of society would be improved by holding that women who sell their chastity are to be treated with pity; such conduct is against the law, therefore they are not entitled to the assistance of the law: and as the dearest interests of society depend upon the chastity that is observed amongst its females, it is not desirable in any manner to encourage breaches of that chastity. It appears to me unnecessary to follow this view of the case any further. It is said that this court will not grant relief to the man when he comes with his bill to have a bond of this description delivered up. It is unnecessary to enter into that question, for that argument is only used as the foundation for the next proposition, namely, that where this court will not grant relief, it will not grant discovery. The plaintiff in equity says, "Although, perhaps, no relief might be granted were I to come with a bill to have the bond delivered up, yet I am not now asking relief or discovery dependent upon my right to that relief, but I come to equity and say, you, the plaintiff at law, are seeking at law to get a judgment of a court of law, withholding from that court the material facts of the case, although these facts are in the knowledge of the plaintiff at law; and he is preventing me from showing the truth of those facts, while he is asking the court of law to give him judgment. I therefore ask the court of equity to restrain the court of law from giving judgment until I obtain this evidence from the plaintiff at law." The question is, whether, supposing that, instead of it being an action at law to enforce the bond, it was the case of a suit by the obligor to be relieved from that bond, and supposing that the court would not grant this relief, does it follow that, upon that ground, he is not entitled to discovery, where he only requires that discovery to defend himself against the action upon the bond? I think the authorities are decisive that he is entitled to that discovery. I observed that Mr. Rolt, in examining the case of *Franco v. Bolton*, did not apply his attention to the concluding part of the judgment, which explains Lord Loughborough's remarks on the subject of discovery, namely, that the discovery sought would have subjected the defendant to the consequence of having lived in an illicit course of life. It would be idle to go through all the cases that have been cited; they all tend to show, that although, where a bill is for discovery and relief, it may be demurrable, yet where a bill is for discovery merely, in aid of a defence at law, it will not be demurrable unless that discovery infringe upon some known rule; and in the present case I do not see any where in the bill an allegation which could subject the defendant in equity to any penalties; it does not state that the trustee knew of the consideration at the time of the execution of the bond. This is, therefore, the case of a bond given to a trustee for a woman, upon an agreement, not with the trustee, but with the woman herself, for illicit cohabitation. But even supposing that the trustee knew of this agreement for future cohabitation, and that the woman had upon this agreement obtained the bond to be given to the trustee for her, who could say that this

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would subject him to pains or penalties? It appears to me, therefore, that where a defendant is sued at law, and he has a good defence upon the nature of the contract, he is entitled to a discovery touching the nature of that contract, where it can be obtained without infringing upon any rules.

Demurrer overruled.

***In re THE NORWICH YARN COMPANY and THE JOINT-STOCK COMPANIES WINDING-UP ACTS.*¹**

December 2, 3, 4, and 5, 1850.

Winding-up Acts—Jurisdiction.

The court has jurisdiction, on appeal from the decision of the master disallowing a claim under a winding-up order, to direct an action at law to try the validity of the debt.

THIS was a motion by Clement Mingay Felton, one of the public officers of the East of England Bank, on behalf of the said bank, that the declaration or decision of Master Blunt, disallowing the claim of the said Clement Mingay Felton on behalf of the said East of England Bank, as a creditor of the Norwich Yarn Company, for the sum of 35,755*l.* 2*s.* 5*d.*, with interest from the 19th May, 1849, might be reversed or varied, and that the said master might be ordered to allow such claim. The Norwich Yarn Company was formed in 1833, as an ordinary trading company, for the purpose of spinning wool and mohair into yarn; and its original capital consisted of 30,000*l.*, divided into 300 shares of 100*l.* each. The officers of the company were nine directors and trustees, three auditors, a treasurer and manager, and secretary. The deed of partnership was dated the 2d August, 1834. The original bankers of the company were the Norfolk and Norwich Joint-stock Bank, but that bank, in 1836, became merged in the East of England Joint-stock Bank, who thenceforth acted as bankers of the yarn company. The capital of the yarn company proved insufficient to enable them to carry on their undertaking, and they shortly afterwards overdrew their account with the bank, and the balance against them with the bank gradually increased till October, 1847, when there was a large balance due; but after that period the yarn company ceased to continue trading, and they had no further transactions with the bank; and in 1849 a petition was presented to wind up the affairs of the company under the joint-stock companies winding-up acts, and an order was made in accordance with the petition. The East of England Bank carried in their claim under this order. The master expressed his opinion that the debt ought to be established by action at law, and he certified that he had not thought fit to allow the claim. The ground on which the claim was disputed before the master, and on the present appeal, was, that the debt was

¹ 15 Jur. 311.

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contracted by the directors and managers of the yarn company without sufficient authority, and in manner not authorized by the deed of partnership; and that the bank had notice of these facts. . On the other hand, for the bank, it was urged that the debt was a common partnership debt, and that, if there had been any deviations from the provisions of the partnership deed by the officers of the yarn company which was not admitted in contracting it, that was a matter to be settled between the shareholders themselves; that the shareholders had acquiesced in such deviation from the provisions of the deed, if any such deviation there was; and also that the bank had not such notice of the provisions of the partnership deed as would affect the validity of their claim against the partners. The principal arguments were addressed to the validity of the debt; but as the court did not decide the point, but left the validity of the debt to be established at law, it is not necessary to report, on the present occasion, this part of the case. But it was contended also for the bank, that the court had no jurisdiction under the winding-up acts to send the case to law, but was bound to decide on the validity of the claim without taking that course. The present report is confined to this point.

Bethell, R. Palmer, and Cole, for the official manager. The whole theory of the winding-up acts proceeds on the principle, that this court is to finally determine and decide on matters coming before it. The masters have power to examine witnesses *viva voce*, may issue commissions, avail themselves of the services of district commissioners of bankrupts, the judges of the county courts, and a variety of other courts, for collecting evidence. 12 & 13 Vict. c. 108, s. 19, 20. These are powers which a court of law has not got. See also 11 & 12 Vict. c. 45, s. 73, 74, 75. By the 78th section it is enacted, that no action or suit shall be commenced or proceeded with against the company, but after proof of debt. The common law right to bring an action is thus taken away, and a party is compelled to come into this court. The master is bound to adjudicate; and if he refuses, the court on appeal is bound to do so. If a party fails in his proof, he may afterwards bring his action; but the obligation to come here first, and the inability to maintain an action if he has not come here, are conclusive testimony that it was the intent of the statute that all things should be decided here in the first instance. By the 75th section, the master is either to allow or disallow, or allow as claims only, such debts and demands respectively, and by writing to declare such allowance or disallowance, or such allowance as claims only. The master in this case has not said that there was not proof sufficient, but merely that he has not thought fit to allow the claim. If there was proof sufficient, he was bound to decide upon it; but that he refused to do. This court is also bound to decide at once on the proof made; it cannot send it to law. If it decide against us, we may afterwards do that. *Thompson v. The Universal Salvage Company*, 13 Jur. 104; 3 Exch. 310, decided, that though a party had got a judgment against a company, he should not be at liberty to take out execution against the members of the company, where there was a winding-up order,

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until he had gone in to prove before the master. Much less can a party bring an action. It is clear that it was intended that this court should be the tribunal to decide on the claim, and that it must decide positively one way or the other, either allowing or disallowing it on the proof given. The court must either affirm the master's certificate and dismiss the appeal, or it must overrule the certificate and allow the exceptions. There is in this case no dispute whatever about the facts.

Roupell and Busk, for the official manager of the yarn company.

Walpole, for certain shareholders of the yarn company, who after the appointment of the official manager, had been allowed by the master to be heard, and who had been served with the notice of motion.

Bethell objected to their being heard; but his lordship allowed them, as the master had done so.

Turner appeared for the directors of the yarn company.

In answer to the argument as to the jurisdiction of the court to send the question to law, the case of *The German Mining Company*, 14 Jur. 874, was referred to, and also the 118th and 57th sections of the 11 & 12 Vict. c. 48.

LORD LANGDALE, M. R. This case has been argued with great learning, great ability, and great ingenuity. If it was my bounden duty, as it is alleged, to give my opinions on the questions of law raised in this case, I must take considerable time to consider of it; but if, as I think,—and my opinion is not altered by the very ingenious argument put to me this morning,—it is my duty, and it is within my province, to obtain the assistance of a court of law for the determination of the legal question which is in issue between these parties, there is no reason why I should now abstain from giving my opinion. In the administration of assets by this court amongst legal creditors, when the debt appears to the court to be clearly due, to be founded upon facts satisfactorily proved, and upon legal principles fully recognized and established, it is by no means necessary, nor is it the practice or duty of this court, to send the creditor to prove his debt at law. The court having the case properly before it,—properly under its consideration in the administration of assets, and having, as I think there can be no doubt, jurisdiction to determine the question of debt or no debt, does so without unnecessarily putting the parties to the additional expense of a trial at law; and in this way debts to a vast amount, far exceeding the notion entertained on the subject by those who have not given themselves the trouble to obtain the necessary information, are constantly being proved and being satisfied, without the parties ever being sent to a court of law on the subject. But if the suit in which the proceedings take place depends wholly for its validity on the legal question of debt or no debt, and the parties interested to resist the claim desire that the matter should be tried at law,

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I think I scarcely recollect an instance in which the court has refused it; and if the question of debt or no debt against the estate or party sought to be charged depends upon a number of circumstances, some of them of a complicated nature, and affected by the usages of trade, — affected by the powers which may or may not be legally incident to trading partnerships, particularly or peculiarly constituted; and, moreover, if the ultimate result depends upon the decision of several questions involving points of law, some of them not well settled, I conceive that, although the validity of the whole proceeding does not depend on the particular claim, yet if those interested in resisting the claim desire to have the question tried at law, this court ought not to deprive them of their *prima facie* right to have the question so decided.

Now, upon the consideration of the present case, I am clearly of opinion that there are questions of intricacy, questions of nicety in point of law, questions which to me, at least, on the consideration of the cases which have been decided, do not appear to have been perfectly decided, — there are circumstances here which induce me to think I ought not to deprive those who resist the claim of that which I conceive to be their right, viz., to have the legal question decided by a legal tribunal. It seems to me, to use the words of Knight Bruce, V. C., in the case mentioned, more proper to be tried at law than it is to be decided here. But, no doubt, if the jurisdiction of the court is ousted by the particular provisions of this act of Parliament, then, however inconvenient, however likely to lead to some mistake or some misunderstanding, however hard on the party to be deprived of that jurisdiction to which the subject properly belongs, it would be for me to perform to the best of my ability the duty cast on me, and I ought to do so. Now, I have considered the act of Parliament with this view. But it is nothing more than a proceeding for the administration of assets under particular circumstances; and I am most clearly of opinion that there is nothing in this act of Parliament to deprive the court of availing itself of any means by which it can get the assistance necessary to lead to a just and satisfactory conclusion of the case.

I think I had it once pressed on me that the attorney's act was an act of such a nature that I could not get assistance from a court of law; but the court is not to be deprived of any means which the law allows it, to get the best assistance it can have. I say nothing about the argument, which was urged warmly, respecting the inconvenience of handing a thing from one court to another; it is for the legislature to consider that. I say nothing about that part of the argument, well and warmly urged too, as to sending the suitor from one jurisdiction to another, and there not being a jurisdiction in any one place to have a complete decision of the question; that is also for the legislature. I believe, if I may be allowed to express a private opinion, that much may be done to lessen the inconvenience on that subject. Those who have to deal with it will find not so much difficulty in the court as in the habit of the country, in having particular jurisdictions allotted to particular cases which arise between parties. That we have nothing to do with here. I have only my duty to perform, which is to con-

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sider whether, under the consideration of this act of Parliament, though the legislature has given to the master jurisdiction and power which he had not before, and in this particular case has limited him to the consent of the parties, it has tied down the court in the manner contended for; and I cannot agree with the argument as to the master's acting under the order of reference, which proceeds from the court. I beg leave to say, it is a great satisfaction to the master that the order of reference does proceed from the court, and that it is the jurisdiction of the court which is exercised; and when the master acts on this, he acts as assistant to, and in aid of, the court, and leaves the matter altogether in the discretion of the court, in the proper exercise of its jurisdiction; and I am of opinion, that, in the exercise of its jurisdiction, I have a right to concede to the parties that which they ask, and that which I want for my own assistance — the determination of a court of law on the question of debt or no debt in this case. I wish to do it in a way most likely to contribute to complete justice being done between the parties here. If they desire to appeal from the opinion I have now expressed, I must do it adversely, that they may not be prevented from having an appeal.

Some discussion afterwards took place as to the form of the order to be made on the motion, and ultimately it was ordered, that the demand on the banking company for 35,755*l.* 2*s.* 5*d.*, with interest from the 19th May, 1849, should be entered and allowed by the master as a claim only; and that the banking company, by their public registered officer, should bring such action at law as they might be advised, against the official manager of the Norwich Yarn Company, to establish their demand. And it was ordered, that the motion should stand over until after the trial of the action, with liberty for any person to apply to the court as he might be advised.

THE KING OF THE TWO SICILIES v. WILLCOX.¹

January 16 and February 11, 1851.

Production — Penalties in Foreign Country — Rebellion — Agents.

A foreign king, by his bill, alleged, that a part of his subjects in rebellion, calling themselves a government, seized the royal treasury and revenue, remitted the money to this country, and thereout purchased a ship; and that he had since put down the rebellion, and he claimed the ship and a discovery. Two of the defendants, foreigners, by their answer, stated that the persons alleged to be in rebellion were independent, and that the king was a usurper, and had been defeated by the above-mentioned government; that many thousand persons had contributed money for the purchase, amongst other things, of this ship, and that the funds were remitted by the government above mentioned to the defendants as agents; and that the production of documents might subject them, and the persons whose agents they were, to penalties in a foreign country: —

Held, on motion for production, that the persons whose agents they were could not be repre-

¹ 15 Jur. 214.

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sented in this court or were represented by the plaintiff; that the liability of third parties or of the defendants to penalties, in a foreign country, was no defence against production; and production ordered accordingly:—

Held, also, that the admission by the defendants of their having been in rebellion did not deprive them of their right to decline production.

THE bill in this case was filed by the king of the Two Sicilies against Brodie Willcox the younger, John Moody, Luigi Scalia, Franco Maccagnone Granatelli, and others, for the purpose of establishing the right of the plaintiff to a steamship which had been purchased by the defendants, as agents for the insurgent government of Sicily, out of moneys which the bill alleged were part of the moneys of the plaintiff, who had since put down the insurgent government. The allegations in the bill are fully stated in the reports of this case on demurrers, 14 Jur. 163, 751. The defendant Granatelli and Scalia put in their answer on the 25th May, 1850. They stated, that they were natives of the Island of Sicily, and not subject to the laws of the kingdom of Naples, and gave an historical account of the independence of the two countries; that after some disputes, in 1812, through the interference of his Britannic majesty's envoy, a constitution was settled, containing provisions for holding parliaments in Sicily, and that Ferdinand, the king of Naples, became king of Sicily under the said constitution, and so long as he should observe the stipulations and conditions therein; that, in the year 1816, Ferdinand repudiated the constitution, and refused to acknowledge the Parliament, and assumed to himself the title of the king of the Two Sicilies, becoming thereby an usurper of the throne of Sicily; that, on the death of Ferdinand, his son Francis styled himself king of the Two Sicilies, and since the death of Francis, the plaintiff has styled himself Ferdinand II., king of the Two Sicilies, and as such has claimed the Island of Sicily; that any authority which he had exercised in Sicily had been exercised by him without the concurrence of the parliament, and by means of Neapolitan troops; that at length, in January, 1848, the people of Sicily rose up in arms at Palermo, for the purpose of overturning the authority of the plaintiff, and restoring a government conformable to the constitution, and that they waged war upon him, and defeated his troops, and took possession of the whole island, with the exception of Messina; that a provisional government was chosen, who summoned a parliament; that the provisional government found in the treasury an inconsiderable sum of money, which had arisen from the public taxes; that, from the time of the appointment of the provisional government, all the powers and authority of the plaintiff in Sicily absolutely ceased, and his rights and property, if any, became vested in the provisional government; that the said parliament made a decree creating a president and ministers, who formed the executive government; that the proceedings of the said parliament and people of Sicily were recognized and admitted by the British government, and two mediations were undertaken between the plaintiff and the executive government, and that the flag of the executive government was saluted by the British ships of war, and several letters from Lord Minto,

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the British envoy, were set out; that in April, 1848, Ruggiero Settimo, the president of the executive government, appointed and despatched to London these defendants, Granatelli, and Scalia, as envoys to her majesty's government; that her majesty's minister for foreign affairs, in a letter to the British envoy, stated, that if the duke of Genoa should accept the throne of Sicily, he would, at the proper time, and when he was in possession of the Sicilian throne, be acknowledged by her majesty; that the parliament of Sicily decreed that the duke of Genoa should be king of Sicily; that before the duke of Genoa had taken possession, an expedition was undertaken by the plaintiff for the conquest of Sicily, and by conquest, and against the will of the parliament and people of Sicily, established the power of the plaintiff over the island, and that he continues to exercise such power; that during these proceedings, various persons, that is to say, many thousands of the natives and inhabitants of Sicily, contributed and paid, under the sanction of the parliament and executive government of Sicily, various sums, to a very large amount, out of their own moneys, into a fund, for the purpose, amongst other things, of purchasing steamships; and inasmuch as such steamships were to be purchased in England, and as the defendants had come to and were in England as aforesaid, a sufficient part of the money so contributed and paid into the said fund was remitted, as thereafter mentioned by the said executive government of Sicily, to the defendants in England, to purchase and pay for two steamships; and as the defendants positively say, no part of the money so contributed or remitted ever belonged to the said plaintiff, or belonged to or come out of the treasury or revenues in the bill mentioned, or the treasury or revenues to which the plaintiff was or could be entitled; and that these defendants were and are trustees of the said money, and are answerable and accountable to the persons who contributed and paid the said money, and to such persons only. They denied that the executive government was an usurping government, or that they were subjects of the plaintiff. They admitted entering into the contract for the purchase of the steamships on behalf of the people of Sicily who had contributed to the fund, and, by their direction, communicated through the executive government. They denied that the executive government applied any part of the plaintiff's revenues in purchasing bills to be remitted to England, but said that various sums out of the fund so contributed as aforesaid were applied to that purpose; and they admitted that they had applied part of the money so remitted in payment for the steam-vessels. They set forth a schedule of documents in their possession relating in parts to the matters in the said bill mentioned, but said that they held the same as agents, and on behalf of the persons by whom they were intrusted with the moneys before mentioned, and submitted that, in the absence of such persons, they ought not to be ordered to produce the said particulars; that the documents were confidential between these defendants and the persons in Sicily whose agents they were; that the production of these documents would be a breach of trust and confidence, and would, as these defendants be-

lieve and have been advised, expose and render subject, both such persons and also these defendants themselves, to criminal prosecution, punishment, and penalties in Sicily in respect of the part taken by such persons and by these defendants in the struggle against the plaintiff thereinbefore mentioned, and would be capable of being used, and would be used, by the plaintiff as evidence against such persons and against these defendants, when within his jurisdiction, in such criminal prosecution. The plaintiff now moved for production of these documents.

Bethell and *Goldsmid*, in support of the motion. The first ground of defence is, that the defendants are agents for persons not parties, in whose absence they cannot be compelled to produce the documents. We cannot recognize those individuals as a government. *Jones v. Del Rio*, Turn. & R. 297. *Thomson v. Powles*, 2 Sim. 194. *Taylor v. Barclay*, Id. 213. The only government recognized is that of the king of the Two Sicilies. *Hullett v. The King of Spain*, 2 Bligh, N. S., 31. These Sicilians, whether as individuals or as a government, cannot be recognized as necessary parties. The second objection is, that the production of these documents may subject the defendants to penalties. That principle has never been applied to penalties in a foreign country. The defendants are now here, and have no intention of going back, and are, therefore, quite safe. If the penalties were inflicted by English law, the court would be able to form an opinion whether the fear was well founded. There are many things legal in this country, but penal in other countries. Suppose a bill was filed for an account of dealings in an opium speculation in China, could the defendant protect himself by saying that if he went to China he might be exposed to penalties by his discovery?

Roll and *Cairns* opposed. We say the documents are in our possession as agents for other parties not before the court; and it is argued that those parties are represented by the plaintiff. We admit that this court can only recognize a government which is recognized by our own government; but can it be said that, in the case of civil war, all documents and property brought to this country by the persons conquered belong to the conqueror? These documents have been placed in our hands by persons pursuing a course tolerated and encouraged by the government of this country. It is not enough to say, that we cannot establish that the government which intrusted us was a government *de facto*, but you must make out that the transaction was so illegal as that no confidence can arise out of it. The answer shows clearly that it was no rebellion, but that the insurgents merely claimed their rights. In fact, the king of Naples was the wrong doer. The constitution of 1812 was recognized by our government, and these persons were sent as envoys to our government. We allege that the money was contributed by private persons in Sicily, for whom we are agents, and in their absence we cannot disclose their documents. *Murray v. Walter*, Cr. & Ph. 114. *Taylor v. Rundell*, Id. 104, 5 Jur. 1129.

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[*Lord Cramworth, V. C.*—I think your case is much stronger if they were private persons than if they were the government, because if they were the government, does it not follow that the government which has conquered them has succeeded to their rights?] I think not; that principle cannot be carried farther than that all the rights which the government has over property in the hands of third parties pass to the successful government. Then as to the penalties. It is true that the defendants are here, and the penalties, therefore, are contingent on their return to Sicily; but all penalties are contingent. The case of opium refers to natives of this country, not to foreigners, who must be presumed to have the intention of returning. The defendants were merely sent here as envoys, and either intend to return, or will be prevented by this discovery from so doing. Besides, the production of these documents will expose other persons living in Sicily to penalties. The principle is, that you are not to criminate yourself, and there is no reason to confine it to crimination in this country. As to the objection that the court cannot judge what is criminal in foreign law, it is always matter of evidence; the court has never had difficulty in ascertaining the civil law of foreign countries. This court will take care that the discovery will not expose the defendants to any penalties. *Brownsword v. Edwards*, 2 Ves. sen. 243. *Harrison v. Southcote*, 1 Atk. 528. *M'Allum v. Turton*, 2 Y. & J. 183.

Bethell, in reply. Previous to the rebellion the king of Naples was sovereign of Sicily, a state of things which the court is bound to know. 14 Jur. 163. Therefore these persons, for whom these defendants are agents, are to be regarded either as rebels, or as agents for the king, who enters into his lawful rights on putting down the rebellion. This was decided in this very case. 14 Jur. 163. This court cannot recognize rebellious subjects as having any *status* whatever; the plaintiff adopts the acts and contracts of these persons, and the documents become his. As to the recognition by the British government, your lordship is bound to believe that such a thing was impossible whilst we remained in alliance with the king of Naples. There are certainly some letters set out, which, if proceeding from authorized agents of the British government, would amount to a gross breach of faith; but there is no distinct averment that the Sicilian government was ever recognized. Then as to the penalties. The defendants say, on the face of the answer, that they did rise in rebellion, and therefore how can they be exposed to any thing by the production of documents? It has never been held that the protection of third parties is a defence to production. *Ewing v. Osbaldiston*, 6 Sim. 608

LORD CRANWORTH, V. C. I cannot decide this case without looking at the bill and answer. The production is refused upon this ground—Granatelli and the other person, in whose hands the documents are, say “they belong to the persons for whom we are acting as agents, who exercised the functions of the provisional government over the funds levied by subscription or contribution.” Then these gentlemen

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say, "They were remitted to us, we having come as deputies from the provisional government, and we employed them, according to their direction, in the purchase of steamships of war; and you cannot call upon us to produce documents not our own, but the property of persons in Sicily." Now, I must look to the answer, and see what is the state of the case. That is a good objection, if, instead of a rebellion, it had been some persons who had succeeded in getting subscriptions, and remitting them here for the purpose of purchasing steamships. That is the one alternative. But suppose, on the other hand, that these persons were clearly exercising the functions of a government, and afterwards the legitimate government, warring with them, conquers them; that government probably succeeded to the rights of the other as conqueror, and to the right to the property they purchased, and to an agency just as well as to property. That is the view of the case which I should off-hand be disposed to take. Between these two extremes there may be very doubtful cases, and parties may stand in an equivocal relation to each other, the rights of which are doubtful. As to the second point, I considered that to be a case of very great nicety. It may be the law that a party may refuse to answer, because his answer may expose him to penalties in a foreign country. Our maxims are, that a person need not expose himself to penalties; but I have always considered that the maxim related to this country, and not to another. If a person was called upon to answer as to mercantile dealings with Spain, most of which are, as we know, contraband, could he protect himself by alleging that discovery would subject him to penalties in Spain? These are extreme cases; but we must not be staggered by them. There may be extreme cases which are staggering, and yet the law must be decided. As to the last authority of Mr. Bethell, I cannot accede to it. I remember, in *Garbett's Case*, C. C. R. 236, which occasioned a great deal of discussion, and in which there was a case produced in which Lord Wynford decided that a witness must go on, all the judges were of opinion that that was wrong. A witness may stop at any moment of time, and has a right to say he will not give one link in the chain of evidence; he may have afforded ample evidence to convict him, but may say he will stop. That, however, does not seem quite consistent with the case of *Ewing v. Osbaldiston*, 6 Sim. 608; but I must look at this case further before I decide.

February 11. LORD CRANWORTH, V. C. The question on this answer is, whether the plaintiff is entitled to call on the defendants to produce these documents in their possession. As the answer admits that the documents relate to the matter in question in the cause, the plaintiff is *prima facie* entitled to see them. But the motion was resisted on two grounds: first, because the defendants say they hold the documents merely as trustees or agents for the persons by whom they were intrusted with the money, and so ought not, in their absence, to be compelled to produce them; and, secondly, because, as to the documents in the first part of the schedule, their production would subject the defendants themselves, and the persons by whom

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the money was remitted, to criminal proceedings in Sicily. I am of opinion that neither of these grounds are tenable. With respect to the first, there seems to me to be a studied ambiguity in the language of the answer. The defendants say they hold the documents as agents and on behalf of the persons by whom these defendants were intrusted with the moneys. Whom do they mean to designate by these words? The several thousand inhabitants of Sicily by whom they say the funds were subscribed, or the executive government who commissioned the defendants to purchase the ships? Not surely the former; there was no privity between them and the defendants. The people by whom the money was raised trusted the then existing government with the funds, leaving it to them to purchase the ships. The answer represents the defendants as having acted on behalf of the people; that is to say, the whole people of Sicily, and by their direction, communicated through the then government.

Now, it is absurd to speak of a whole people as *cestuis que trust*, to be made parties to a suit in this court. If they can be treated as *cestuis que trust*, it is obviously impossible that they should appear or be represented here otherwise than by their government. Have the defendants then a right to say that the persons who carried on the government when the money was remitted to England are the *cestuis que trust*, so that, in their absence, they, so being merely their agents, ought not to be called on to produce the documents? I think not. Every government, in its dealings with others, necessarily partakes, in many respects, of the character of a corporation. It must of necessity be treated as a body having perpetual succession. It would not be represented by all or any of the individuals of whom it is from time to time composed. The answer shows, with respect to the provisional government, that, during the time of the transactions in question, material changes took place as to the persons who from time to time composed that government. Those who, as constituting the government, stood, if they did stand, in the relation of *cestuis que trust*, or of principals, towards the defendants, ceased to fill that character when they ceased to be members of the government. So that, the executive government being now at an end, either the defendants have ceased to fill the character of trustees or agents at all, or they have become trustees or agents of the plaintiff, as the person now in possession of the supreme authority. The case may be likened to that of a person who had in his hands property intrusted to him by a corporation. If, by the death of all the members of the corporation, or, by act of parliament or otherwise, the corporation should come to an end, it surely could not be contended that the party intrusted with the property could be made responsible to the individuals, or the representative of the individuals, who constituted the corporation when the trust was created. Reasoning from analogy, I am of opinion that the defendants are not, in any sense, the agents or trustees of the individuals who composed the government by whom the funds were remitted. If they are trustees or agents at all, they are trustees or agents of the plaintiff, and not of persons from whom, as constituting the government for the time being, they received the funds. This point — that

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is to say, the necessity of making co-defendants the persons by whom the money was remitted to England — was raised by the demurrer for want of parties. The demurrer was overruled by the late vice chancellor of England; and that decision would of itself be decisive of this branch of the defendants' objection, unless by the answer some new facts are stated showing the necessity of making parties persons who were not so shown by the bill. I think, for the reasons I have shortly adverted to, that in this respect there is no material difference between the bill and the answer. The second point is one on which I have not been able to discover any authority; but, on principle, I think that the objection is untenable. The defendants, it will be observed, say that the production of the documents might subject certain persons in Sicily, as well as themselves, to highly penal consequences. It is hardly necessary to say, that so far as the objection relates to the consequences which the discovery might entail on others, it would not hold even if the penalties would be incurred in this country. The privilege is confined to penal consequences likely to be occasioned to the party himself, *nemo tenetur seipsum prodere*. But there is no privilege against disclosing matter within the knowledge of the party, merely because it might subject other persons to punishment. Can the defendants, then, object to answer that which might subject themselves to penal consequences if they should go to Sicily? I think not: the rule relied on by the defendants is one which exists merely by virtue of our own municipal law, and must, I think, have reference exclusively to matters penal by that law — to matter as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not entail penal consequences. As, for instance, if a witness were to say, "I decline to answer that question, because it may show that five years ago I exercised an office without first taking the oaths," the judge would be able to say, as matter of law, "That cannot subject you to penal consequences, by reason of the subsequent indemnity acts." So, where an act of Parliament has passed for indemnifying witnesses from prosecution on account of matters to which their evidence is thought necessary, if a witness, ignorant of the statute, were to object to answer a question because it might subject him to penalties covered by the statute, the judge would be able to say, "that it is a mistake of the law; you are exposed to no such penalties, and must therefore answer;" and very many similar cases may be suggested. But in respect to penal consequences in a foreign country, this cannot be; no judge can know, as matter of law, what would or what would not be penal in a foreign country, and he cannot, therefore, form any judgment as to the force or truth of the objection of a witness when he declines to answer on such a ground. In the present case, indeed, there will probably be no difficulty in believing that the defendants are speaking quite truly, as the documents may, in all probability, form links in a chain of evidence which might enable the courts in Sicily to convict the defendants of high treason. But if the principle is once admitted, it must be admitted in all its ramifications. Thus, for instance, in a bill against a firm, some of whom, though resident

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here, are Spanish subjects, seeking an account of mercantile transactions in Spain, the defendants might refuse to set out an account of their transactions, on account of the dealings having been, as probably they would have been, to a great extent, contraband, and so tending to subject them to penalties for having infringed the fiscal law of Spain. The case was put at the bar of a bill for an account of an opium transaction in China; and instances might be multiplied to almost any extent, by ascertaining, as matter of fact, what acts by the laws of any foreign country are penal, though not so here, and which might become the subject of investigation in our courts. The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend, furnishes very strong, and, to my mind, satisfactory, evidence that the objection cannot be sustained. It is to be observed that in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws, and wilfully go within the jurisdiction of the laws he has violated. Now, in the present case, the parties objecting are Sicilian subjects, and so the probability of their returning to Sicily may be great. But if the objection is once in such a case admitted, it is very difficult to say why it should not apply to an Englishman, who, having been in a foreign country, and there violated the law, (by smuggling, for instance,) afterwards returns home. He may intend to go abroad again, and then the discovery which he is here called on to make might there subject him to penalties. I am of opinion, for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our own laws, and so that the objection in the present case cannot be sustained. The consequence is, that the plaintiff is entitled to the usual order for the production of all the documents.

TURNER v. TURNER.¹

February 21, 1851.

Injunction — Indictment.

The agents of the receiver in a cause, acting under leave of the court, took forcible possession of a house occupied by a servant of one of the defendants. An order was made restraining that defendant from prosecuting an indictment against the agents.

In this case a suit had been instituted for the administration of the estate of William Turner, deceased, and in the course of it a receiver had been appointed, and an injunction had been issued restraining the defendants, William Stephens Meryweather and Mary Ann his wife, from carrying on actions of ejectment for the recovery of any

¹ 15 Jur. 218.

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part of the lands and hereditaments of the said William Turner. Part of the lands and hereditaments consisted of an old mansion house, near Plaistow; and by an order made in this cause on the 7th May, 1850, it was ordered, that the receiver should be at liberty to pull down the mansion house and dispose of the materials. The receiver accordingly, on the 29th May, sent a solicitor, accompanied by a builder and workmen, to pull the house down. On arriving at it they found a woman in possession, who stated that she had been placed therein by the defendant William Stephens Meryweather, and who refused to open the door. The solicitor thereupon pushed open the door and entered with the workmen: the house was pulled down and the materials sold, and the produce accounted for in the receiver's account. William Stephens Meryweather had since preferred a bill of indictment against the solicitor, builder, and workmen, for forcibly entering and expelling him from the said mansion house. One of the parties to the suit now presented a petition, praying that William Stephens Meryweather might be restrained from prosecuting this indictment.

Rolt and Prior, in support of the petition, cited *York v. Pilkington*, 2 Atk. 302, and *The Attorney General v. Cleaver*, 18 Ves. 220.

Henniker (*Bethell* with him, absent) opposed. This court never interferes to restrain criminal proceedings. *Holderstaffe v. Saunders*, 6 Mod. 16. *Montagu v. Dudman*, 2 Ves. sen. 396. At all events, costs cannot be given against us.

Hardy, for other parties.

LORD CRANWORTH, V. C. I shall certainly make an order restraining Mr. Meryweather from prosecuting the indictment. The distinction is very intelligible; this court has no jurisdiction over an indictment in general, as over a mere civil proceeding; but this is merely with reference to its own jurisdiction. If the court makes an order to which all parties consent, or by which all parties must be considered as bound, and then any party chooses to obstruct the parties executing it, the court will certainly prevent him from proceeding against the officer of the court for doing that which he would have been punished by the court for not doing. I shall not make an injunction under the seal of the court, but an order restraining Mr. Meryweather from prosecuting this indictment. The costs of all parties, except Mr. Meryweather, to come out of the estate.

In re St. John's Hospital.

*In re St. JOHN'S HOSPITAL.*¹

February 14 and 17, 1851.

Charitable Trust — Advowson — 5 & 6 Will. 4, c. 76.

The advowson of the mastership of the Hospital of St. John the Baptist at Bath, with the chapel of St. Michael thereto annexed, was, previous to the act 5 & 6 Will. 4, c. 76, (the municipal corporation regulation act,) vested in the corporation of Bath, the hospital being exclusively for the benefit of the poor of Bath, and under the government of the master:—

Held, that the advowson was ancillary to the charity, and was held upon a charitable trust within the 71st section, and was not liable to be sold under the 139th section; and it was referred to the master to appoint new trustees under the former section.

QUEEN ELIZABETH, by letters patent under the great seal, bearing date the 21st November, in the twenty-fifth year of her reign, granted the advowson, donation, and free disposition and right of patronage of the mastership of the Hospital of St. John the Baptist, in the city of Bath, with the chapel of St. Michael thereunto annexed, to the mayor and citizens of the city of Bath, and their successors forever. In Hilary term, 1711, an information was filed, at the relation of the master, the co-brethren, and sisters of the hospital, against the mayor, aldermen, and citizens of the city of Bath, to have a discovery of the original foundation and settlement of the hospital, and of the charities thereto belonging, and of the deeds and writings touching the same, and of the annual value of the charity lands and possessions, and to set aside a lease mentioned in the information, and to have such rules and orders made for the application of the charity estates and possessions, and the government of the hospital and charity for the future, as should be thought necessary and convenient. The cause came on to be heard before Sir John Trevor, then master of the rolls, on the 26th November, 1713, when all the parties, by consent, submitted themselves and all matters in the cause to the award of Sir John Trevor. Sir John Trevor accordingly made his award, which was afterwards confirmed by an order *nisi*, whereby he found, *inter alia*, as follows: "I find, that, by the pleadings in the said cause, it appears that this hospital was founded in the year 1174 by one of the bishops of Bath and Wells, and that it has consisted of a master, brethren, and sisters, who have been kept very poor and indigently; and I find by the grant to this hospital, and by the admission of all, that, by the charity of pious persons, the hospital has been advanced to great possessions, the improved value thereof being 1200*l.* per annum, or thereabouts; and although there has been 130*l.* per annum reserved rent to the hospital, I find that the said hospital all along has been very much neglected, and badly provided for, and very negligently, as to the service of God; for although there is a chapel called St. Michael, which is annexed to the mastership of the hospital, and is a living presentable with cure of souls, yet I find it was sometimes turned into an ale-house, and at other times a post-office; and I find that

¹ 15 Jur. 233.

In re St. John's Hospital.

the abbots of Bath formerly took on them to be masters of the hospital; and that Queen Elizabeth having, in the fifteenth year of her reign, granted the presentation of the said hospital to the mayor and corporation of Bath, they, about the year 1616, made an order, that the mayor of Bath, for the time being, should be master of the said hospital, pursuant whereto the mayors of Bath took on them to be masters, and to dispose of the possessions and revenues belonging to the said hospital as they pleased; and that the corporation of Bath before that time had made an agreement with one Buskin, their master, to make only such leases as they directed, and allowed him only 40s. per annum; and that the said hospital, and possessions and revenues thereof, continued to be so managed and swallowed up until the restoration of King Charles II." The 4th section of the award directed, that all the writings relating to the hospital should be delivered to the master of the hospital, by a schedule, and should be kept by him and his successors in the hospital in a certain chest. The 8th and 9th sections provided for the employment of the rents and revenues of the hospital for the benefit of the poor brethren and sisters, and that all fines upon new leases should be received by the master for the time being; as to two thirds, to the use of the master; and the remaining third for the benefit of the co-brethren and sisters, to be paid and distributed to them monthly, in equal shares. By the 10th section of the award it was declared that the right of presentation of the master belonged to the corporation of Bath by the grant of the fifteenth year of Elizabeth, but that they had no right to be visitors; and that the government of the hospital should be in the master for the time being, according to such rules and orders as were annexed to the award, and that the brethren and sisters should be obedient to him; and that the master should take care that prayers were duly read in the chapel morning and evening, according to the liturgy of the church of England; and further, the master was enjoined from christening, marrying, or burying any person or persons in the chapel, except the burying of the poor of the hospital in the said chapel-yard and ground, as had been formerly done. By the 11th section it was provided, that the poor people, brethren, and sisters, as vacancies should happen, should be nominated and put in by the master of the hospital; but such poor brethren and sisters were to be such as had been settled inhabitants of the city of Bath for at least ten years before such admission into the hospital, and persons really poor, indigent and unmarried, and to be qualified according to the rules and orders established by and annexed to the award, and not according to the arbitrary will and pleasure of the master. From the date of the award, the master of the hospital, when any vacancy occurred, was nominated by the corporation of Bath; and the hospital was governed, and the brethren and sisters appointed, and the income of the property belonging to the hospital distributed in the manner directed by the award. By an order made by the lord chancellor, bearing date the 16th September, 1836, in the matter of several charities of the city and borough of Bath, including the Hospital of St. John the Baptist, and in the matter of the act 52 Geo. 3, c. 101, and in the matter of the act 5 &

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6 Will. 4, c. 76, on the petition of the burgesses of the city of Bath, it was ordered that it should be referred to the master in attendance during the vacation to appoint proper persons to be trustees of and for the charity estates and property late vested in or under the administration of the corporation of Bath, or any members thereof in that character, which were affected by the 71st section of the act of the 5 & 6 Will. 4, c. 76. By an order made by the lord chancellor, bearing date the 21st September, 1836, in the matter of the estates and property of the master, co-brethren, and sisters of the Hospital of St. John the Baptist, and in the matter of the act of the 5 & 6 Will. 4, c. 76, on the petition of the master of the hospital, it was ordered that the master of the hospital should have liberty to go before the master on the subject of his petition, under the reference directed by the order of the 16th September, 1836. In the proceedings before the master, under the order of the 16th September, 1836, it was arranged, under the sanction of the master, that the rights of the corporation, in relation to property belonging to the hospital, should not be taken into consideration under the order of reference. A petition was now presented to the lord chancellor in the matter of the master, co-brethren, and sisters of the hospital, and in the matter of the above-mentioned acts, stating, *inter alia*, the facts above mentioned, and praying that it might be declared that the right of presentation, nomination, and appointment of the master of the hospital, with the chapel of St. Michael thereunto annexed, were, at the time of passing the act 5 & 6 Will. 4, c. 76, vested in the mayor, aldermen, and citizens of the city of Bath, as charitable trustees within the meaning and provisions of the act; and that it might be referred to the master to appoint proper persons to be trustees of the right of presentation, nomination, and appointment.

Wood and E. F. Smith, in support of the petition. In the charter of Elizabeth this is called "the mastership of the hospital, with the chapel of St. Michael's thereto annexed." In Sir John Trevor's award the chapel is said to be "annexed to the mastership," and is described as "a living presentable with cure of souls." Here the duties of the mastership, and of attending to the cure of souls, have never been, and cannot be, separated. The chapelry is entirely appendant to the mastership. Previously to the municipal corporation act, the right of presentation was in the mayor and corporation of Bath, and was clearly a hereditament. The question is, whether it was a hereditament "held in trust, in whole or in part for charitable trusts," so as to be within the terms of the 71st section; or whether the corporation held it "in their corporate capacity, and not as charitable trustees, within the meaning of the act," so as to entitle them now to have it sold, under the 139th section of the act. The only persons to derive benefit from the institution are the poor brethren and sisters, who, under the 11th section of the award, are to be chosen from among the really poor and indigent inhabitants of Bath. This, therefore, was a charitable trust in the mayor and corporation. Sect. 139 was intended to provide for the sale of advowsons and rights of

nomination, which, previously to the passing of the act, could have been disposed of by corporations for their own benefit. That the right of presentation to the mastership of this hospital was not a right of which the corporation of Bath could have so disposed, is clear from the 4th section of the award, which provides, that all the writings relating to the hospital shall be kept by the master and his successors in the hospital. The right of presentation was, previously to the act, vested in the mayor and corporation for a charitable use and trust, and was within the 71st section of the act; and the trusteeship of the corporation having ceased, new trustees must be appointed. *In re The Shrewsbury School*, 1 My. & C. 648. Lord Cottenham's decision in *In re The Oxford Charities*, 1 Jur. 620; 3 My. & C. 239, was the other way; but the fund out of which the lectureships in that case had been founded was held by the corporation upon trust for their own benefit, and the foundation did not alter its character in this respect. The act 1 & 2 Vict. c. 31, which extended the operation of the 139th section, is applicable to municipal corporations seized of lands, with an obligation to nominate priests for certain chapels. But here the corporation did not take land subject to any such obligation.

The Attorney General and *M. A. Shee*, for the mayor and corporation. Whether the offices of master and of chaplain are connected or not, the mayor and corporation have no charitable trust nor any species of duty to perform beyond that of presenting to the mastership. The master has certain duties of a charitable nature; the mayor and corporation have none beyond that of appointing the master. So far as the 139th section applies to advowsons and rights of presentation not being appendant or appurtenant, it enacts that they shall be sold, whether held by the corporation as charitable trustees or in their corporate capacity. Here the right of presentation is not appendant—it is a mere right to present. The fact of another interest being connected with it, viz., that of appointing to the mastership, does not alter its character. Vide Lord Stowell, in *The Duke of Portland v. Bingham*, 1 Hagg. Consis. 163. But even assuming the chapelry to be appendant to the mastership, so as to bring the case within the exception to the 139th section, the right of appointing the master was never held by the corporation upon trust. Therefore, *quacumque via*, the right of presentation ought to be sold, under sect. 139. Here there was no trust, no restriction affecting the right of presentation, except that common to all advowsons, of appointing a clerk duly qualified. In *The Shrewsbury School Case* there was a restriction in favor of a privileged class. Here there was no preference in favor of any class. The corporation might have appointed any clerk without becoming amenable to this court for a breach of trust. It is not, however, necessary to determine whether this case is within sect. 139 of stat. 5 & 6 Will. 4, c. 76, as it is clearly within the 1 & 2 Vict. c. 31, and is consequently brought by the latter within the 139th section of the former act. *Hine v. Reynolds*, 2 Man. & G. 71. This, therefore, is not a case for the appointment of new trustees under sect. 71, but for sale under sect. 139 of the act.

Wood, in reply. The construction attempted to be put upon the 139th section is ungrammatical: the words "in their corporate capacity, and not as charitable trustees," are applicable in that section as well to the clause relating to advowsons in gross, as to the clause relating to advowsons appendant or appurtenant. Therefore, assuming this right of presentation to be in gross and not appendant, still, being held by the corporation as charitable trustees, it is excluded from the 139th section, and cannot be sold. The purchaser might have no interest in the welfare of the poor inhabitants of Bath, and therefore none in appointing a master willing or able to discharge his duties.

LORD CHANCELLOR. It seems to me that this case does fall within the 71st section. The object of this institution was charitable in every part of it. The grant of Queen Elizabeth and the award of Sir John Trevor look to the benefit of no parties other than the poor and indigent inhabitants of the city of Bath: the only object was to secure their welfare. [Having read the 71st section, his lordship continued.] This section provides for the case of bodies corporate seized or possessed of any estate or interest in any hereditaments, in whole or in part, in trust, or for the benefit of any charitable uses or trusts whatsoever. The word "hereditaments" is the largest known in the law, and will include the right of presentation of the master of this hospital. The question, then, is this: Was this right of presentation vested in the corporation of Bath, in whole or in part, in trust, or for the benefit of any charitable use or trust? It is clear that it was vested in the corporation only as ancillary to the charitable objects of the institution. The appointment of the master was an appointment of a person to carry out certain charitable trusts which are enumerated in the award, and all of which are for the benefit of poor and indigent inhabitants of the city of Bath. The benefit of the corporation formed no part of the objects to be attained. Originally it was supposed that the corporation were sufficiently interested in the objects of the institution to be trusted; but it was found that they abused this trust, by neglect and misapplication of the charity property. It was, therefore, thought right to intrust the government of the hospital, and the duty of seeing to the performance of the ecclesiastical duties, to the master for the time being; and the right of appointing the master was vested in the mayor and corporation, upon trust to appoint a person competent to discharge the duties of master. Whatever might be the merits of the person they appointed, if he was not qualified to discharge the duties mentioned in the award, the trust was not discharged. No doubt the duties of such a trust, as in the case of *The Shrewsbury School*, were of a kind easily evaded, and it would be difficult to prove a breach of such a trust; but it was, nevertheless, a trust, and one of which the abuse, if proved, would have been corrected. I own I think *The Shrewsbury School Case* strongly in point. [His lordship read at considerable length from the judgment of Lord Cottenham in the matter of *The Shrewsbury School*, 1 My. & C. 647, 648, and continued.] The whole object of these remarks was to

 Phipps v. Budd.

prove that in that case the right of presentation was vested in the corporation of Shrewsbury for trust purposes, and they are no less applicable to prove my view of the present case. In this case the right of presentation is more closely connected with the charitable purposes of the institution than in the case of *The Shrewsbury School*. The case of *The Oxford Charities* does not at all impugn that of *The Shrewsbury School*. The corporation of Oxford, instead of founding lectureships with the 1000*l.*, might have applied it in founding a library for their own benefit, or for any other merely corporate purpose; and, after the lectureships were founded, the corporation was at liberty to have the sermons preached with closed doors, the whole trust being exclusively for the corporation. The question in both cases was this: For whose benefit does the right exist? In *The Oxford Case* there was no object to be benefited beyond the corporation itself; in *The Shrewsbury Case* there was, in part at least, such an object; and Lord Cottenham decided both cases accordingly. I do not see that the stat. 1 & 2 Vict. c. 31, has any material bearing on this case. Upon the whole, I think this was strictly an advowson held for charitable purposes, within the 71st section of the act 5 & 6 Will. 4, c. 76. I must, therefore, refer it to the master to appoint new trustees. Costs will be reserved, as usual.

At the commencement of the hearing, *Glasse*, on behalf of the master of the hospital, objected that he had not been served. The lord chancellor, however, heard the cause in his absence, and, at the conclusion of his judgment, said he could not see the object of the master of the hospital attending before the master under the reference, and refused to burden the charity with his costs.

 PHIPPS v. BUDD.¹

December 10, 1850.

Claim — Mortgage — Leave.

A MORTGAGE had been made for the term of 500 years, containing a covenant by the mortgagor to convey the fee when required. This was a claim for a foreclosure of the equity of redemption, and to have the freehold reversion and inheritance conveyed to the mortgagor. The registrar had refused to file the claim without leave.

Cardwell now asked for leave to file it.
Leave given.

¹ 15 Jur. 162.

Stevens v. The South Devon Railway Company.

STEVENS v. THE SOUTH DEVON RAILWAY COMPANY.¹

January 16, 17 and 28, 1851.

Injunction — Application to Parliament.

The shareholders of the South Devon Railway Company consisted of two classes, viz., the proprietors of whole shares and the proprietors of half or guarantied shares, and the directors introduced two bills into Parliament to vary the rights and privileges of the respective classes:—

Held, on motion for an injunction by an owner of whole shares, who alleged that the proposed alteration would be injurious to the owners of whole shares, that, having regard to the public character of the company, the proposed scheme could not be considered as such a breach of trust or duty to the company as would induce the court to restrain the directors from using the name and seal and credit of the company in introducing and prosecuting the bill, they entering into a similar undertaking to that imposed on the defendants in *Parker v. The Dunn Navigation Company*. But an injunction was granted to restrain the application of the funds of the company in prosecuting the bill in Parliament, so far as it proposed to affect the privileges attached to the half shares. And the question as to the payment of the costs to be incurred in prosecuting the bill was reserved.

THIS was a motion on behalf of the plaintiff, that the defendants might be restrained from using or applying the funds, moneys, or credit of the company in, for, or towards the payment of the costs, charges, and expenses of, or incident or preparatory to, the introduction into and prosecution in Parliament of the two bills in the pleadings mentioned, or either of them, or any other bill for the like purpose; and also from introducing or soliciting the said two bills, or any other bill for the like purpose, or using the name or seal of the company for the introduction or soliciting of such bills, or either of them.

The bill in the cause was filed by Charles Stevens, on behalf of himself and all other the holders of original or whole shares in the South Devon Railway Company, except such of the defendants as might be holders thereof. The bill stated the act of Parliament by which the South Devon Railway Company was incorporated and empowered to raise capital by the issue of shares of 50*l.* each; that the plaintiff was the holder of 1400 of these shares, and had paid all his calls; that by the South Devon Railway act, (amendment and branches,) 1846, the company were empowered to raise additional capital by creating new shares; and it was provided that the new shares to be so created should be of such nominal value, and entitled to such privileges, as the company should determine.

At a meeting of the shareholders held on the 9th January, 1847, the directors were authorized to raise the additional capital authorized to be raised by the amendment act, 1846, at such times and in such manner as they might deem expedient, and for the interest of the company. And at a meeting of the directors on the 19th January, 1847, they resolved that the sum of 500,000*l.*, authorized to be raised by the amendment act, 1846, should be raised by creation of half shares of 25*l.* each, on the 15th March, 1847; that 6*l.* per cent. per annum

¹ 15 Jur. 235.

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should be guarantied until the 15th March, 1857, upon all calls duly paid, and upon all sums received in anticipation of calls, by authority of the board of directors, in respect of such half shares, and that the said guaranty should not exclude the shareholders from participation in any higher rate of dividend for the time being, payable on the whole shares. The bill then alleged, that, by the said resolutions, the power of attaching privileges to the half shares was fully exercised, and that the resolutions defined the entire extent of the said privileges, and the extent of preference which the holders of original and whole shares were to concede to the persons who should take the half shares; that in pursuance of the said resolutions of the 19th January, 1847, and upon the terms thereof, the directors issued on the 15th March, 1847, 20,000 half shares of 25*l.* each, which were all taken; but the plaintiff was not the holder of any of the said half shares. The bill then stated, that the full amount of both original and half shares had been called up, and that the company had also exercised their powers of borrowing to a large extent; that the railway was completed and opened for traffic from Exeter to Plymouth, and that the amount was sufficient to keep down the interest on the debt, but no dividend had hitherto been paid to the holders of either original or half shares; that the directors introduced into Parliament in the last session a bill, intituled "A bill for enabling the South Devon Railway Company to create new shares in their company, for the regulating the payment of dividends on the shares in their company, and for other purposes:" that the effect of the said bill, if the same had passed, would have been to alter the then existing established rights of the two classes of shareholders, and to vary the terms upon which the half shares had been created, and in particular would have sanctioned the right alleged by the half shareholders to the payment, by way of arrears, of their preferential dividend for years in which no profits were made, and the right alleged by them to the payment of the said dividend and arrears out of the profits of the company arising upon the capital of the company, however increased, neither of which rights the holders of half shares could have maintained against the holders of whole or original shares, except by the authority of Parliament; that the plaintiff opposed the bill, and it was thrown out; that the directors, in preparing and soliciting such bill, incurred costs exceeding 1000*l.*, which they had paid out of the funds of the company; that the directors intended to introduce and solicit, in the name and with the funds of the company, in the session of Parliament, 1851, two bills, having for their objects essential variations in the contract between the holders of whole or original and the holders of half shares, as contained in the resolutions of the 19th January, 1847, and other matters. The bill then stated certain notices published by the directors as to the objects of the proposed bills, and also other proceedings by the directors and shareholders in reference to such proposed bills, and sanctioning their introduction into Parliament; and the bill alleged, that the effect of the proposed arrangement, which it set out at length, but which it is not necessary to state, if carried into execution, would be to give to the holders of half shares much

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greater advantages and right of priority over the holders of whole shares, than the said holders of half shares were entitled to under the said resolutions of the 19th January, 1847, and proportionably to postpone the holders of original shares, and to take from the value of the shares held by them; that the said arrangement and intended application to Parliament were contrary to the terms in which the original or whole shares were postponed in favor of the half shares, and in fact amounted to a destruction of the said original or whole shares; and that it had been devised and was intended for the benefit of the directors themselves and the other holders of half shares, and not for the benefit but to the loss of the plaintiff, and those on whose behalf he sued; that the directors intended to apply the funds of the company in paying the costs of introducing and soliciting the said bills, whether the same were or not sanctioned by Parliament; and that they had no right, even with the consent of a majority of the company, to use the name and funds of the company in applying to Parliament for its sanction to a measure beneficial to one section of the company, and injurious to another section; and that the introduction and soliciting the said bills was an attempt by the directors to obtain, by means of their control over the common seal of the company, a dissolution or alteration of the original contract by which the shareholders of the company were bound together and protected. And the bill prayed an account of all moneys expended by the directors out of the funds of the company in payment of the costs, charges, and expenses of, or incident or preparatory to, the said two bills of which notice had been given; and that the directors might be decreed to make good to the company all moneys so expended by them, with interest; and that the South Devon Railway Company, and the directors thereof, might be restrained from using or applying the funds, moneys, or credit of the company in, for, or towards the payment of the said costs, &c., of, or incident or preparatory to, the introduction into and prosecution in Parliament of the said two bills, of which notice had been given as therein mentioned, or either of them, or any other bill for the like purpose; and also from introducing or soliciting the said two bills, or any other bill for the like purpose, or using the name or seal of the company for the introduction or soliciting of such bills, or either of them.

Turner, Cairns, and Stevens for the plaintiff.

Roupell and O. Hall, contra.

The following cases were cited: *Parker v. The River Dunn Navigation Company*, 1 De G. & S. 192. *Ward v. The Society of Attorneys*, 1 Coll. 370. *Munt v. The Shrewsbury and Chester Railway Company*, 15 Jur. 26. *Const v. Harris*, Turn. & R. 496. *The Attorney General v. The Corporation of Norwich*, 16 Sim. 225. *The Attorney General v. The Guardians of the Poor of Southampton*, 17 Sim. 6.

January 28, 1851. LORD LANGDALE, M. R. This was a motion

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made on behalf of the plaintiff for an injunction to restrain the defendants from using or applying the funds, moneys, and credit of the South Devon Railway Company in, for, or towards the payment of the costs, charges, and expenses of, or incidental or preparatory to the introduction into and prosecution in Parliament of two bills mentioned in the plaintiff's bill of complaint, or either of them, or any other bills for the like purpose; and also from introducing or soliciting the said two bills, or any other bill for the like purpose, or using the name or seal of the company for the introduction or soliciting such bills, or either of them.

The South Devon Railway Company was incorporated by an act of Parliament, to which the royal assent was given on the 4th July, 1844, and by which it was provided that the sum of 1,100,000*l.* should be the capital of the company, and that the same should be divided into 22,000 shares, each of the amount of 50*l.*, and every person subscribing 50*l.* to the capital was to be deemed a shareholder of the company, and to have one share therein allotted to him; and after the whole sum of 1,100,000*l.* should have been subscribed for, and one half thereof had been actually paid up, the company were empowered to borrow, on mortgage or bond, such sums of money as should from time to time be authorized to be borrowed by order of the general meeting, not exceeding in the whole the sum of 366,500*l.* By a resolution of the company, entered into in August, 1844, it was resolved that the directors should take measures to reduce the amount of the capital of 1,100,000*l.* to 1,000,000*l.*, and consequently 2000 of the shares which were authorized to be issued were not issued. By an act of Parliament, which received the royal assent on the 28th August, 1846, the company were authorized to raise, by the creation of new shares or stock, a further sum not exceeding 500,000*l.* with a proviso that the new shares so to be created should be of such nominal amount and entitled to such privileges as the company might determine.

At an extraordinary meeting of the shareholders held on the 9th January, 1847, the directors were authorized to raise an additional capital of 500,000*l.*, in such manner as they might deem expedient, and for the interest of the company; and on the 19th January, 1847, in pursuance of that authority, the directors resolved that the sum of 500,000*l.* should be raised by the creation of half shares of 25*l.* each, on the 15th March, 1847; that 6*l.* per cent. per annum should be guaranteed until the 15th March, 1857, on all calls paid, and on all sums received in anticipation of calls, by authority of the board of directors, in respect of such half shares, and that the guaranty should not exclude the shareholders from participating in any higher rate of dividend for the time being, payable on the whole shares. In pursuance and on the terms of this resolution, the directors, on the 15th March, 1847, issued 20,000 half shares of 25*l.* each. Under these circumstances there are two classes of shareholders, namely, the holders of the original or 50*l.* shares, and the holders of the 25*l.* or half shares. The plaintiff belongs to the first class; he is the holder of, or interested in, a great many original shares, and has paid about

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70,000*l.* for calls thereon; he is not the holder of any 25*l.* or half shares. It is said that the company have borrowed all the money they are entitled to raise on mortgage or bond, and that the railway has been completed and opened for traffic from Exeter to Plymouth, a distance of fifty-seven miles, and is yielding a considerable yearly revenue, but that no dividend has yet been declared on either the whole or the half shares. In this state of things, differences have arisen between the shareholders of the two classes as to the true meaning and effect of the resolution of the 19th January, 1847.

The plaintiff, who is interested only in the whole shares, alleges that the directors are largely interested in the half shares, and that although the holders of the half shares are entitled to such, and only such, privileges as were given to them by the resolution of the 19th January, 1847, yet the directors, in the year 1850, introduced, or caused to be introduced, into Parliament a bill, purporting to empower the company to create new shares to an amount not exceeding 625,000*l.*, to bear interest in perpetuity at any rate not exceeding 6*l.* per cent. per annum; and the plaintiff, apprehending that the effect of such bill, if passed into a law, would be to alter the existing and established right of the holders of the original shares and the holders of the half shares in the company, as between themselves, and to vary the terms upon which the half shares have been created, applied to be heard against the bill; and accordingly he was heard before the committee of the House of Commons, to which the bill was referred, and the committee reported that the preamble of the bill was not proved; and the bill was for that time abandoned. The directors, however, continued to attend to the subject, with a view to the difficulties arising out of the opposing claims of the two classes of shareholders.

A special meeting of the shareholders was held on the 24th September last, and it was then resolved, that it appeared for the interest of the company that some equitable arrangement should be made with the holders of the half shares, with a view to admit both classes of shareholders to an immediate participation in the revenues of the company; and the directors were requested to put themselves in communication with some of the leading shareholders of both classes, with a view to devise some scheme for the purpose, and that scheme was to be submitted at a meeting of shareholders to be afterwards convened to consider it. The directors, having consulted Mr. A., and received a report from him, issued a notice, whereby they convened an extraordinary meeting of the shareholders of the company, to be held on the 12th November last, to receive and consider a special report of the directors relative to the proposed commutation of the privileges attached to the 25*l.* or half shares of the company, referred to the consideration of the board by a resolution of the special meeting of the 24th September, and also relative to the other matters in the same notice stated.

At this meeting the directors made their own report, stating and recommending a scheme for the proposed commutation of the privileges attached to the 25*l.* or half shares in the company. The report

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of the directors was adopted, and the directors were authorized to take all necessary and proper measures for the purpose of giving effect to the recommendation therein contained, and particularly to apply to Parliament for all such additional powers as might be requisite for that purpose; and accordingly the directors have taken, and are taking, the necessary steps for that purpose. I do not think it necessary to discuss the merits of the proposed scheme, for the purpose of considering whether, in itself, and independently of the peculiar circumstances which may, on the whole, recommend it to the adoption of the company, it is calculated to promote either its general interest, or the peculiar interest of either of the two classes of shareholders into which it is divided. The plaintiff alleged, that it is calculated to give a benefit to the holders of the half shares at the expense and to the loss of the holders of the whole shares. It may be so, and it may at the same time be possible, that even such an arrangement and such a commutation of the privileges attached to the 25*l.* or half shares would, though at first be productive of some loss to the shareholders of the whole shares, ultimately be so beneficial to the general concerns of the company, as in the end to be profitable to the holders of the whole shares themselves. Into this I do not enter; for it seems to me to be clear that the scheme, if authorized and carried into effect, will very materially alter the existing rights and interests of the two classes of shareholders who are interested in it. It is, I think, admitted that the company itself has no legal power to do this. Parliament alone has power to authorize it; but I cannot say that the nature of the case is such as to make an application to Parliament by the company, for the purpose of authorizing the scheme, a breach of trust or of duty to the company. To hold otherwise would, I think, be applying too strictly to a company of this kind the principles admitted to be applicable to a private partnership resting on private contracts unconnected with public duties and interests, and capable of dissolution.

It was indeed stated, that if the application to Parliament were made by or in the name of the company, the plaintiff and other members of the company, alleging that they had an adverse interest, would not be allowed to appear in opposition to the bill. I own I have great difficulty in supposing that such is the course of proceeding in parliamentary committees, but it is said that some instances have occurred in which this has been done; and it is therefore satisfactory to me that there is in this court such a precedent as is found in the case of *Parker v. The Dunn Navigation Company*. And in this case the defendants have offered to give the undertaking that was given by the defendants in that case; and upon their giving that undertaking, I am of opinion that I ought not to restrain the defendants from using the name or seal of the company for introducing or prosecuting the bill. It is plain, that using the name or seal of the company may subject the company to some liability; and if the bill should not pass, or if it should pass without a clause authorizing the payment of the costs out of the funds of the company or other funds, it may be a question hereafter how those costs ought to be paid. That seems to

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me to be a question which the company, in their authorized proceedings, may be left to deal with when it arises; and in respect of such future liabilities, I think I ought not now to interfere. But as to the present funds of the company, the case seems to me to be different. These funds consist of moneys paid or subscribed for the general purposes of the company — for the purposes in which all the shareholders of the company are interested. According to the contracts now subsisting between them, it is beyond the power of the company itself to alter and modify these contracts; and I think it is reasonable and within the jurisdiction of this court, until legal authority is obtained, to restrain the defendants from applying the funds or moneys of the company now in their hands in or towards the payment of the costs of so much of the bill as proposes to affect the scheme for the commutation of the privileges attached to the 25*l.* or half shares.

Motion refused, so far as it sought to restrain the directors from using the name and seal or credit of the company in prosecuting the bill in Parliament, and granted as to the application of the funds of the company for that purpose.

 ROBINSON v. LAMOND.¹

January 13 and 21, 1851.

Account — Discovery — Penalties — Answer — Belief — Practice — Setting down Exceptions.

An allegation, in an answer to a bill against brokers, partners, for an account of dealings in stock, that discovery would expose the defendants to penalties under the stock-jobbing act, is sufficient to protect the defendants from the discovery.

The defendants to the same bill were interrogated as to which of them received the several sums of money, and whether the same were paid in cash or checks. They set forth an account of their receipts as joint, and only specified the sums received:—

Held sufficient.

The answer stated, that an account of all dealings was set forth in the schedules, and stated that the defendants have set forth, to the best of their belief or otherwise, a full account:—

Held sufficient.

Where, previous to November, 1850, exceptions had been allowed by the master, and a further answer was put in, the cause can be set down on the old exceptions before the vice chancellor.

THE bill in this case was filed by David Robinson against William Okey Lamond and Alexander Lamond, stockbrokers, for an account of the dealings between the plaintiff and the defendants, as such stockbrokers. The bill contained the following interrogatories: No. 4. Whether the dealings and transactions between your orator and the said defendants, or one of them, during the period aforesaid, or some and what period, did not consist of the purchase and sale by the said defendants, or one and which of them, and whether or not as brokers

for or on account of your orator, of divers and what or some and what shares in divers and what or some and what railway companies; and whether or not other and what undertakings; and whether or not of divers and what or some and what sums of railway stock; and whether or not stock in the public funds; and whether or not and other and what securities and particulars bought and sold by the said defendants, or one and which of them, as brokers, or how otherwise, in the way of their said trade or otherwise; and whether or not for or on account of your orator, or how otherwise; and whether during, and whether or not in the course of such transactions between your orator and the said defendants, or some and which of them, or otherwise or in fact, your orator did not from time to time, and whether or not at various and what or some and what time or times, advance and pay to the said defendants, or one and which of them, and whether or not by checks, and whether or not by cash, various and what or some and what sums of money, to a large and considerable and what or some and what amount in the whole, or how otherwise; and whether the said defendants, or one and which of them, did not from time to time, and whether or not at various and what or some and what time or times, pay to or for the use of your orator various and what or some and what sums or sum of money; and whether or not to a large and what or some and what amount in the whole, or how otherwise? No. 17, viz., whether some or one and which of the accounts so made out and delivered by or on behalf of the said defendants hereto, or one and which of them, have not or hath not been made out in the handwriting of the said defendants hereto, or one and which of them, or how otherwise; and that the said defendants hereto may discover and set forth from what materials, and from what books, accounts, memoranda, or other and what papers or documents such accounts, or any or either and which of them, were respectively made out. The defendants put in an answer, with three schedules annexed, to which answer the plaintiff took eight exceptions, which were argued before the master previous to November, 1850. The master allowed some of the exceptions, and the defendants then put in a further answer, with a schedule of 1000 folios, containing in form a full debtor and creditor account, as between the plaintiff and the defendants, of such of the transactions as did not relate to dealings in the public funds. The plaintiff now came to the court upon the old exceptions. The answers contained the following statements: That the dealings between the plaintiff and defendants consisted, amongst other things, of the purchase and sale by the defendants, as brokers, on account of the plaintiff, of the several shares in the several railway companies or other undertakings, and of the several sums of foreign stock, and railway stock, and other particulars, in the schedules in that behalf stated, and of stock in the public funds; but the defendant said that such dealings or transactions did not, nor did any of them, consist of the purchase or sale, as brokers or otherwise, of any other securities or particulars bought or sold by the defendants, or either of them, as brokers or otherwise, for or on account of the plaintiff; that the plaintiff advanced or paid to the defendants, by checks and by cash, the

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various sums of money mentioned in the second and third schedules, to the amount of 14,551*l.*; that the defendants paid to or for the use of the plaintiff the various sums or sum of money mentioned in the schedules, amounting in the whole to the sum of 20,711*l.* And the defendants, by their further answer, stated that all the dealings and transactions that ever took place between the plaintiff and defendants, other than the purchases and sales of stock, were set forth in the schedules to this and to the first answer annexed; and the defendants declined to answer as to the purchases and sales of stock, as being of the nature of time bargains, and said, that by reason of their having acted as such brokers and agents as aforesaid in the matters aforesaid, and by reason of the stat. 7 Geo. 2, c. 8, the defendants were advised and believed that the discovery by them, or either of them, of all or any of the matters or particulars therein before by them declined to be answered, would subject or tend to subject them to penalties; and that they in the schedules thereto annexed had set forth, to the best of their *belief or otherwise*, a full, true, and just account of all and every the sales and purchases, receipts, payments, and other dealings and transactions of the defendants, to and for, and on behalf and by the authority, and at the instance and request of the plaintiff, except only in respect of stock in the public funds; and the defendants stated, that save as therein and in the defendants' former answer appearing, and save as to the dealings in stock, they were respectively wholly unable to set forth, as to their belief or otherwise, any account as asked for.

Rogers, in support of the exceptions.

Bethell and *Martindale*, for the defendants, took an objection that the exceptions had been improperly set down. These were the old exceptions, and having once been before the master, they were still before him. The orders of the 2d November, 1850, do not apply to any exceptions actually pending.

Rogers. We have set these exceptions down, and given notice, in compliance with the 12th and 19th orders. Under the old practice, we must have come to the court to obtain an order referring back these exceptions.

LORD CRANWORTH, V. C. There is some difficulty about this; but in my opinion this is properly to be heard now. The attention of the judges was drawn to the question, whether any saving at all could be made. Some little doubt existed whether, even in existing references, the jurisdiction was not taken away. The judges, however, thought, that, as to pending matters, the jurisdiction of the master still remained, and the orders were made accordingly. Now, here, what is proposed is, that there shall be a new order of reference, but no new exceptions. It is not a reference for scandal pending before the master; perhaps it would have been very convenient if the rule had been otherwise; but that is not my construction, and I understand it has been so decided by the other courts. I think the court has jurisdiction.

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Rogers, in support of the exceptions. The defendants do not tell me which of them received the money, or whether it was paid in cash or checks. They also refuse to make any discovery whatever as to their dealings in the public stocks, alleging that it would subject them to penalties under the 7 Geo. 2, c. 8. *Fisher v. Price*, 18 Law J. Rep. (N. S.) Chanc. 235; 11 Beav. 194. There is no case in which a defendant has refused to give an account of the stock bought and sold by him as broker. Then the answer as to "belief or otherwise" is insufficient; it may mean "belief or disbelief." The defendants could not be indicted for perjury on such an answer.

Bethell, in reply. In *Fisher v. Price*, 11 Beav. 194, some of the dealings were legal, and some illegal: here we distinctly swear that the discovery of any would subject us to penalties; and that it would do so, is clear from numerous cases. As to the "belief or otherwise," we have stated in other parts of our answer that we have set out a full account: besides, those words, as usually used in an answer, have a technical meaning, and have been decided to mean "knowledge, remembrance, information, or belief;" and that is the only meaning that can be attributed to them.

LORD CRANWORTH, V. C., said, the greatest difficulty he had was upon the point whether the answer "on belief or otherwise" is sufficient. He did not think that he need make a decision which would be a great scandal on the practice of the court, by saying that the addition of those words would vitiate what would be otherwise sufficient. His lordship thought that the defendants saying that they had set forth an account is sufficient, and must override those other words. His lordship would be glad to be able to come to the conclusion that the answer was sufficient; but the plaintiff had a case for an account, and the documents were mentioned in the schedule; but they were not marked in a way in which the plaintiff was entitled to have them marked. As to the point about the stock, he had no doubt that the authority of Knight Bruce, V. C., in *Short v. Mercier*, 13 Jur. 835, was conclusive, because when a man is engaged in transactions as broker, and pledges his oath, and says that he cannot disclose any thing without exposing himself to a penalty, the court cannot help it. It may be that he is deceiving the court; but that cannot be helped. The case before Lord Langdale is clearly distinguishable. He does not say that there were any lawful transactions, or that they took place within two years. He does not say that there was any thing except time bargains. Then as to the account, the exception is, that the defendants do not say whether payments were made by cash or checks. When they swear and admit the receipts, what does it signify how it came to them, whether in cash, gold, checks, or bank notes? Then as to the exception, that the answer does not set out which of the parties received the money. If you are bringing an express account, it may be against one, but here there is no charge against one alone. Here they purchased divers railway shares, and say it was done in effect by both; whether by one or the other

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is immaterial, and they charge each of themselves with the transactions. It seemed to him that it is quite immaterial, even if they are not bound to answer. This disposes of the first and fifth; his lordship must consider as to the remaining exceptions.

January 21, 1851. LORD CRANWORTH, V. C. As I said the other day, I felt that there was a very fair schedule. As to this schedule, nothing can be more ample than the manner in which the parties have set out the transactions; and there is plain proof that it had not embarrassed any one, because the objection, as to "belief or otherwise" being insufficient, was not started till the end of the argument. I fix upon what follows: they say, "save as herein appears;" so that, whatever that means, they say that that is the sole account which they can give. I have come to the same opinion with which I set out. I am convinced that I was right upon the subject of this answer as to "belief or otherwise." Upon consideration, I think this is completely answered.

 ROSS'S TRUST.¹

January 20, and February 27, 1851.

Married Woman — Separate Use — Alienation — Trustee Act — Costs.

Gift by will to trustees of 3000*l.*, on trust to pay the interest to the separate use of R., and that the same should remain during her life under the direction of the said trustees, as a provision for her, and the interest of it given to her, on her personal appearance and receipt by any banker. After the death of R. the 3000*l.* was to be rendered back to the testator's estate. R. married:—

Held, that she could alien the life interest.

The 3000*l.* was paid into court by the trustees, under the trustee relief act. The assignee applied for the dividends:—

Held, that the costs of all parties, except R., should come out of the corpus.

JAMES ROSS, by his will, dated the 4th September, 1824, gave the sum of 3000*l.* consols, being part of his property in consols, to trustees, upon trust that they would pay and apply the annual interest, being 90*l.*, unto his wife, Ann Ross, for her sole and separate use, independent of any husband she might thereafter marry, and of his control, debts, and engagements, and her receipts to be a sufficient discharge to the said trustees; and he directed that the said sum should remain during her life, and be, under the direction of the said trustees, made a duly administered provision for her, and the interest of it given to her, on her personal appearance and receipt, by any bankers in London or elsewhere, the said trustees might appoint in London or elsewhere, as might suit the parties, by half-yearly instalments of 45*l.* each, but to cease and be void on her death, together with the trust,

¹ 15 Jur. 241.

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and the capital of 3000*l.* consols to be rendered back to his estate by the said trustees, and to become, in like manner as his other personal property, the joint and separate property of the legitimate children of his brother, Thomas Ross, their heirs, executors, and administrators. He appointed his said brother sole executor, and died in 1831. His brother having died in his lifetime, administration of his brother's estate was granted to Jane Ross, who transferred the 3000*l.* to the trustees. The widow married a second husband, Thomas Wetherell, and during the life of her second husband assigned to Goulden Collins her interest in the 3000*l.* consols, by way of security, for annuities which the second husband had granted. The husband died, and the trustees transferred the sum into court under the act. The petition was presented by Collins, the assignee, and prayed for payment of the dividends to him during the life of Mrs. Wetherell.

Southgate, for the petitioner.

Bethell and *T. S. Clarke*, for Mrs. Wetherell, contended that the effect of the direction, that the half-yearly payments should be made on the personal appearance of the widow, was equivalent to an express clause against anticipation; and that the alienation, or attempted alienation, during the second coverture, was invalid.

Berkeley, for a prior assignee.

LORD CRANWORTH, V. C., said, he had no doubt whatever as to the rights of the parties in this case. The court, in establishing the doctrine as to the separate interest of married women, had required to be perfectly satisfied that the intention of the settlor or donor was, that the husband should be excluded from the interest in the property given to the wife. A limitation to the "absolute use" of the wife did not intimate this, and the separate use clause thus arose. The establishment of this right to a separate enjoyment of the property still left it subject to the ordinary incidents of property, and amongst the rest to the wife's power of alienation. The question discussed in Lord Thurlow's time, whether a married woman could be deprived of, or protected against, the right of alienation, resulted in the adoption of the well-known clause restricting her power of anticipation. It had been truly said by Mr. Bethell, that no particular form of words was necessary to produce this effect, and that Lord Cottenham could not have held that any such particular form was required. The substance of the limitation was alone regarded by the courts of law, except, perhaps, in some few forms of conveyance having a feudal origin. The particular words, "without power of anticipation," were not necessary; but it must be clear, and this was probably what Lord Cottenham had held, that the words used, whatever they were, must have the meaning attributed to them. The question was, Did the words in this case impose that restriction? He thought not. The personal appearance of the lady was implied in the direction to pay into the proper hands; but that direction had over and over again been held

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not to restrain the power of alienation. The payment must be made to the petitioner; the costs of all parties to be paid out of the fund.

Before the order was drawn up, the registrar suggested that the children of Thomas Ross, who were entitled to the fund in remainder, ought to have been served with the petition, as the costs were to come out of a fund to which they would be entitled. This was accordingly done, and as they objected to allow the costs out of the fund, the petition was set down again.

February 27, 1851. *Southgate*, for the petitioner. The costs ought to come out of the corpus, or out of the residue of which it forms part, as they are the costs of settling a question arising out of the terms of the will. (Trustee relief act, sect. 2.) If we had filed a bill for the administration of the estate, we should have had our costs out of the residue, and this is an analogous case. We are entitled to one set of costs, as representing Mrs. Wetherell.

Bethell and *T. S. Clarke*, for Mrs. Wetherell. The fund in the hands of the executors pays for construing the will; so if part of the fund is in the hands of other parties. There was a question, whether, on the construction of the will, Mrs. Wetherell could alien; and this must be regarded as a suit for the purpose of determining that question. Suppose the trustees had taken the opinion of counsel on the point, they would certainly have been right in deducting the costs out of the corpus. Mrs. Wetherell has raised no dispute; there is no allegation that she has; and the trustees have paid this money into court in order to be safe, and the court raises the question before it will part with the dividends.

Malins and *Fooks*, for the children of Thomas Ross. This fund has been handed over to the trustees, and the dividends have been regularly paid to Mrs. Wetherell, and would continue to be paid had it not been for this alienation, which occasions the difficulty. Mrs. Wetherell contests the rights of her own assignee, and the question relates merely to the dividends. What interest do we take in the matter, and why should we pay for its litigation? Suppose the assignee had filed his bill against Mrs. Wetherell, he would not even have made us parties, and the costs must have been paid by Mrs. Wetherell or out of the dividends. Beames on Costs, 14. The proper order would have been for the assignor and assignee to have joined as petitioners, and have their costs out of the fund in question, that is, the dividends. Suppose there had been twenty successive tenants for life; is the fund to bear all the costs of their disputes? At all events, there can be only one set of costs. *Heywood v. Grazebrook*, 13 Jur. 619. *Greedy v. Lavender*, 11 Beav. 417; 18 Law J. Rep. (n. s.) Chanc. 62. The petition does not even ask for costs.

Southgate, in reply. This fund has merely been carried over to a separate account, and still remains part of the residue, and is applicable to the costs of administration. The trustees have not paid the

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dividends alone into court, but have paid the principal. The fund is in court to be administered, and this is the suit. As to the petition not praying for costs, it is not usual; a bill in an administration suit does not ask for costs, which form part of the general relief. There is no case in which costs have been ordered to be paid out of the dividends. *Re Dickson*, 1 Sim. (N. S.) 37. It is, perhaps, possible that a suit might have been framed for the litigation of this question without making the remainder-men parties; but this is a suit for the general administration of the 3000*l.*, and the order for payment of the dividends forms part of the administration.

LORD CRANWORTH, V. C. The real question is, What is the principle of the court in giving costs under the trustee relief act? I have had doubts if the construction is, that costs must be given as if there had been a suit, when the trustees come into the court and throw it upon the court to say how the fund is to be disposed of. Is it the same as if the party seeking to get the money out of court had filed a bill for that purpose? I see no other principle applicable. Now, how would this case have been if this fund had been in the hands of trustees, and Mr. Collins, claiming as assignee of the life interest of Mrs. Wetherell, had filed a bill? First of all, put Mrs. Wetherell out of the question. I agree that it is hard that those who are entitled in remainder are to bear any costs; but the legislature has thought that the interests of all parties will be best protected by the fund being paid into court, and then the fund must bear the costs from time to time of ascertaining who is entitled to the dividends. All costs, therefore, occasioned by the proceedings of the tenant for life to have the fund adjudicated upon, must come out of the fund. That would be the case if there was no Mrs. Wetherell, or no doubt as to the assignment. Then comes this question as to the costs of Mrs. Wetherell, as all the others must come out of the corpus. Those who appear for Mrs. Wetherell contend that this question arises under a clause in the will of the testator; that he has left it uncertain; and that, consequently, according to the ordinary rule, the costs of adjudicating as to her claim must also be treated as costs in the cause, and come out of the residuary estate. We have not the residuary estate before us, and I think it must be dealt with as a legacy paid to the trustees, and severed from the corpus; and the circumstance that the persons in remainder are entitled to the residue does not affect the question. The estate, therefore, stands thus: The trustees have paid into court the fund to which Mrs. Wetherell is entitled for life; she has assigned it for valuable consideration; and after her coverture is at an end, a question arises whether that is or is not valid. I do not think that is a question properly arising out of the testator's will; it arises from the act of the parties afterwards; and, consequently, though Mr. Collins brings Mrs. Wetherell before the court, because the trustees say she sets up a claim, I think that has been created subsequently to the will. The only way I can dispose of that is this—I refuse her claim, and I do not think I ought to give her any costs at all, because her costs have been occasioned by the assignment she

Ex parte Stevens.

has made, and the dispute she has afterwards raised. She had a right to assign, and has made an assignment which I treated as valid. The assignee stands in her place, and though the corpus must bear the costs of one tenant for life, that will be the costs of the assignee. As to Mrs. Wetherell's costs, I say nothing.

Costs of all parties, except Mrs. Wetherell, out of the fund in court.

*Ex parte STEVENS.*¹

March 6, 1851.

Railway Company — Costs.

IN this case, purchase money had been paid into court by a railway company in the usual manner, under the land clauses consolidation act; and the parties interested in the money wishing to purchase another piece of land, a reference had been made to the master as to whether it would be a proper purchase. The master had refused to certify that it was so, but it did not appear on what ground.

Murray now applied to the court for payment of the money out of court, and asked that the company might pay the costs of the former application and reference. *Re Taylor*, 1 Mac. & G. 210. *Re Walker*, 15 Jur. 161, *ante*, 91.

C. M. Roupell, for the company, objected to pay the costs of the former application and reference.

LORD CRANWORTH, V. C., said that he quite admitted the propriety of the principle in the cases referred to; and he had, when sitting as one of the lords commissioners, reversed a decision of Knight Bruce, V. C., who had considered that the act of Parliament did not give him jurisdiction to make the company pay costs of repeated applications; but his lordship thought that an application of this sort stood on quite a different footing, as it had failed, and was in the nature of an abortive scheme. If the master had disallowed it on account of not being beneficial to the estate, the expense ought not to have been incurred; but if on the ground of title, then the parties might possibly recover from the vendor any costs they had been put to.

Costs to come out of the fund.

¹ 15 Jur. 243.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

●
WOLTON v. GAVIN.¹

November 15, 1850.

*Mutiny Act — Desertion — Articles of War — Enlistment — Sunday
— Attestation of Recruit — Imprisonment, Justification of.*

The mutiny act and the articles of war apply only to her majesty's forces.

An enlistment on a Sunday is not void under 29 Car. 2, c. 7.

A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the mutiny act:—

Held, that such soldier must be presumed to have been regularly attested. The fact that the soldier intended to have taken the recruit to be attested before a justice who had no authority to attest, affords no counter presumption that the recruiting soldier had been himself improperly attested.

The provision in the 55th section of the mutiny act as to the questions to be asked of a recruit before enlisting him, is directory only, and the omission to comply with it will not vitiate the enlistment.

By sect. 57 of the mutiny act, if any recruit shall receive enlisting money, knowing it to be such, and shall abscond or absent himself from the recruiting party, and shall not voluntarily go before a justice within four days to be discharged, such recruit shall be deemed to be enlisted and a soldier as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter:—

Held, (*hesitante* Erle, J.) that a recruit who had not been discharged, and had absented himself more than four days after receiving the enlisting money, might be punished as a deserter, although he had never been attested.

The 20th article of war provides that no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer who shall at the same time deliver an account in writing, signed by himself, of the crime with which the prisoner is charged:—

¹ 20 Law J. Rep. (N. S.) Q. B. 73.

Wolton v. Gavin.

Held, by Lord Campbell, C. J., Coleridge and Wightman, JJ., (*dissentiente* Erle, J.,) that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who delivered a written signed charge of the crime, is justified under that article in detaining such soldier, although he was not taken before a civil magistrate, and a warrant obtained for his detention.

The 20th article of war applies to military offences, including desertion; but by Erle, J., it applies only to those who are soldiers *de facto*, and not to those whose qualification as soldiers is disputed.

TRESPASS for assault and false imprisonment.

Plea — Not guilty "by statute."

At the trial, before Coleridge, J., at the sittings in Middlesex, after Michaelmas term, 1849, it appeared that the action was brought against the defendant, who was the commanding officer of the 16th Lancers, stationed at Ipswich, under the following circumstances: The plaintiff was, on Sunday, the 16th of April, 1848, at a public house, the Plough, at Sutton, in the county of Suffolk, where he resided with his father. While there he met one Backhouse, who had been enlisted three or four weeks previously into the artillery, but who was not proved to have been attested. Backhouse was a native of Sutton, and had come there, not in uniform, on leave to see his friends. He had received directions from a bombardier of the artillery, named Hutchinson, to enlist any young man who was fit for the service. While they were at the Plough together, the plaintiff asked Backhouse to enlist him, which Backhouse at first refused to do, as it was during evening service; but after some entreaty he at last gave him 1s., and asked him whether he was free, able, and willing to serve her majesty Queen Victoria for twelve years, to which the plaintiff replied that he was. Backhouse then appointed to meet the plaintiff at the Plough the next morning, in order to go with him to Ipswich to the bombardier, to be examined and sworn in. He did not come according to his appointment, and Backhouse, after waiting an hour and a half, went to the house of the plaintiff's father, where he found the plaintiff, who refused to go to Ipswich, without, however, assigning any reason for his refusal. Backhouse the same day returned to Ipswich, to Hutchinson, and told him that he had enlisted the plaintiff on the preceding evening, and stated where he lived and who he was, whereupon Hutchinson filled up a paper with the particulars, and gave it to a gunner named Crow, who returned with Backhouse to Sutton, on Tuesday, where they found the plaintiff ploughing; they gave him the paper, and he returned with them to Ipswich. On his arrival at Ipswich he received a billet from Hutchinson, who directed him to be at his (Hutchinson's) billet at 9 o'clock, the following morning. He did not, however, come, and on searching for him he was not to be found. A certificate of his name and place of abode was afterwards filled up and taken to a magistrate of the borough of Ipswich, who signed it. On Thursday, the 27th of April, he was found at Sutton at his father's house by Hutchinson and an escort, and he was handcuffed and taken back to Ipswich, and lodged in the county jail. On the Saturday, the 29th of April, Hutchinson took the plaintiff before a county magistrate at Woodbridge, and

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requested him either to convict the plaintiff as a deserter or to discharge him ; but the magistrate refused to interfere, as he said the enlistment was void, and the plaintiff was accordingly taken back to Ipswich jail, where he remained until the 1st of May. On that day Hutchinson took the plaintiff to the guard-room of the 16th Lancers, and lodged a written charge against him, which he signed and gave to the adjutant of that regiment. In consequence of this he was confined in the black hole of the cavalry barracks for eighteen days by the directions of the defendant, at the expiration of which time he was discharged by an order from the horse guards.

For the defendant, the mutiny act and the 20th article of war¹

¹ The following sections of the mutiny act, 13 & 14 Vict. c. 5, were those referred to:—

Sec. 46. "That upon reasonable suspicion that a person is a deserter, it shall be lawful for any constable, or if no constable can be immediately met with, then it shall be lawful for any officer or soldier in her majesty's service, to apprehend or cause such suspected person to be apprehended, and to bring or cause him to be brought before any justice living in or near such place, and acting for the county or borough wherein such place is situate, or for the county adjoining such first-mentioned county or such borough ; and such justice is hereby authorized and required to inquire whether such suspected person is a deserter, and if it shall appear by the testimony of one or more witnesses, taken upon oath, or by the confession of such suspected person, or by the knowledge of such justice, or by evidence sufficient to satisfy such justice, that there are reasonable grounds for believing that such suspected person is a deserter, such justice shall forthwith cause him to be conveyed in civil custody to the head-quarters or depot of the regiment to which he belongs, if stationed within five miles of the place of apprehension, or if such head-quarters or depot shall not be stationed within five miles, then to the nearest or most convenient public prison, (other than a military prison set apart under the authority of this act,) whether such prison be in the county or borough in which such suspected person was apprehended or in which he was committed, or not ; or if the deserter shall have been apprehended by a party of soldiers of his own regiment in charge of a commissioned officer, such justice may deliver him up to such party, unless the officer shall deem it necessary to have the deserter committed to prison for safe custody ; and such justice shall transmit an account thereof, in the form prescribed in the schedule annexed to this act, to the secretary of war," &c.

Sec. 47. "That every jailer or person having the immediate inspection of any public prison, jail, house of correction, lock-up house or other place of confinement in any part of her majesty's dominions, is hereby required to receive and confine every deserter who shall be delivered into his custody by any soldier conveying such deserter under lawful authority, on production of the warrant of the justice of the peace on which such deserter shall have been taken, or some order from the office of the secretary at war," &c.

Sec. 48. "That any recruit who shall desert prior to joining the regiment for which he has enlisted, shall, on being apprehended and committed for such desertion by any justice of the peace upon the testimony of one or more witnesses upon oath, or upon his own confession, be liable to be transferred to any regiment or depot nearest to the place where he shall have been apprehended, or to any other regiment to which her majesty may deem it more desirable that he should be transferred," &c.

Sec. 55. "That every person who shall receive enlisting money, knowing it to be such, from any person employed in the recruiting service, and being an officer, non-commissioned officer, an attested soldier, or an out-pensioner of Chelsea Hospital, authorized to enlist recruits, shall be deemed to be enlisted as a soldier in her majesty's service, and while he shall remain with the recruiting party shall be entitled to be billeted ; and every person who shall enlist any recruit, shall first ask the person offering to enlist, whether he does or does not belong to the militia, and shall within twelve hours after the receipt of the enlisting money, cause to be taken down in writing the name and place of abode of such recruit ; and (if such recruit shall not reside in, or

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were relied on as a justification. The counsel for the plaintiff contended, that as the mutiny act and articles of war only applied to soldiers belonging to the forces, it was necessary for the defendant to prove that the plaintiff had been properly recruited and attested; that the enlistment was void because Backhouse had no authority to enlist, it not appearing that he had himself ever been attested, and also on the ground that it took place on a Sunday, and that the questions prescribed by sect. 55 of the mutiny act were not asked; and, moreover, that the defendant was not authorized to receive or detain the plaintiff, unless under a warrant of a magistrate of the county where he was taken.

in the vicinity of, the town or place where he offered to enlist) the place also at which he shall declare that he intends to sleep, in order that within forty-eight, but not sooner than twenty-four hours, (any intervening Sunday not included,) after his having received the enlisting money, notice of his having so enlisted be given to the recruit, or left at his usual place of abode, or at the place where he stated that it was his intention to sleep; and when any person shall be enlisted as a soldier in her majesty's land service, he shall within four days, (any intervening Sunday not included,) but not sooner than twenty-four hours after such enlisting, appear, together with some person employed in the recruiting service of the party with which he shall have enlisted, before any justice or other magistrate residing in the vicinity of the place where such person shall have enlisted, or before any justice or other magistrate acting for the division, district or place where such recruit shall have been enlisted, and not being an officer in the army; and if such recruit shall declare his having voluntarily enlisted, the said justice shall put to him the several questions contained in the schedule to this act annexed, and shall then and there, and in the presence of the said recruit, record, or cause to be recorded in writing his answers thereunto; and the said justice is required forthwith to read over, or cause his clerk in his presence to read over, to such recruit, the 40th and 46th articles of the articles of war against mutiny and desertion, and to administer to such recruit the oath in the schedule to this act annexed," &c.

Sect. 56. "That any recruit appearing as aforesaid before such justice, shall be at liberty to declare his dissent to such enlisting, and upon such declaration, and returning the enlisting money, and also paying the sum of 20s. for the charges expended upon him, together with the full amount of subsistence and beer-money which shall have been paid to such recruit subsequent to the period of his having been enlisted, shall be forthwith discharged and set at liberty in the presence of such justice; but if such person shall refuse or neglect within the space of twenty-four hours after so declaring his dissent, to return and pay such money as aforesaid, he shall be deemed and taken to be enlisted as if he had given his assent thereto before the said justice. Provided also, that it shall be lawful for any justice to discharge any person who shall have hastily enlisted, and who shall apply to him to declare his dissent within such four days as aforesaid, upon payment of the sum of money required to be paid by any recruit declaring his dissent under this act, notwithstanding no person belonging to the recruiting party shall be with the recruit, if it shall appear to such justice, upon proof to his satisfaction, that the recruiting party has left the place where such recruit was enlisted, or that the recruit could not procure any person belonging to such party to go with him before the justice," &c.

Sect. 57. "That if any recruit shall receive the enlisting money from any person employed in the recruiting service, (knowing it to be such,) and shall abscond or refuse to go before such justice, or shall thereafter absent himself from the recruiting party or person with whom he enlisted, and shall not voluntarily return to go before some justice within such period of four days as aforesaid, such recruit shall be deemed to be enlisted and a soldier in her majesty's service, as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter, or for being absent without leave, under any articles of war made for punishment of mutiny and desertion; and such recruit shall not be discharged by any justice of the peace after the expiration of such four days as aforesaid, unless it shall be proved to the satisfaction of such justice that the true name and residence of the recruit were

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The counsel for the defendant answered that the 20th article of war was, by itself, a complete defence, as the plaintiff had been committed as a prisoner to the charge of the defendant by a non-commissioned officer, who at the time delivered and signed an account in writing of the crime with which he was charged; and further, that if necessary the plaintiff had been properly enlisted and was a deserter within the terms of the mutiny act.

The learned judge thought that the 20th article of war applied only to soldiers, and that the defence depended upon whether the plaintiff had been regularly enlisted and had absconded. He told the jury that there was evidence from which they might infer that Backhouse was duly attested and had authority to enlist; that the omission to ask the plaintiff the questions required by the mutiny act did not vitiate the enlistment, and that it was not illegal because it took place on a Sunday, and that if the jury thought that the plaintiff had been enlisted and had absconded, he was a prisoner whom the defendant was bound to receive and detain. The jury found a verdict for the defendant.

In the ensuing term a rule *nisi* was obtained for a new trial, on the ground that the learned judge had misdirected the jury in the points above stated, and also on the ground of surprise.

Sir A. Cockburn, (Solicitor General,) M. D. Hill, and Welsby now (Nov. 11, 14) showed cause. First, as to the authority of Backhouse to enlist. It must be presumed that a person who is found acting in a particular office or duty is *prima facie* possessed of the proper qualifications for that office or duty. And the same rule must be here applied as prevails in the case of a constable or other public functionary. *Taylor on Evidence*, s. 111. If it is necessary to give proof of the authority of Backhouse to enlist, the same principle must be applied to all those from whom Backhouse derived his authority, so that there would be no limit to the inquiry. But if such a presumption is made, it is conclusive until it is rebutted by evidence showing that Backhouse had no authority, and no such evidence was given by the plaintiff. All that is relied upon is something in the nature of a

disclosed and known to the recruiting party, and that no notice was given to the recruit, or left at his usual place of abode, of his having so enlisted. Provided, that in every case wherein any recruit shall have received enlisting money, and shall have absconded from the party, so that it shall not be possible immediately to apprehend and bring him before a justice, the officer or non-commissioned officer commanding the party shall produce to the justice before whom the recruit ought regularly to have been brought for attestation, a certificate of the name and place of residence of such recruit; and the justice to whom such certificate shall be produced shall, after satisfying himself that the recruit who had absconded cannot be found and apprehended, transmit a duplicate thereof to her majesty's secretary at war," &c.

The following article of war was also referred to:—

Art. 20. "No officer commanding a guard or provost marshal shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer belonging to our forces; which officer or non-commissioned officer shall at the same time deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged."

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counter presumption, which is said to arise from the fact of its having been proposed to take the plaintiff to be attested by a borough justice instead of a county justice, and therefore it is argued that it must be inferred that Backhouse was himself improperly attested. But no such counter presumption arises, and if it did, it is questionable whether it would be sufficient to rebut the presumption arising from the acts of Backhouse.

[*Cotteridge, J.* The plaintiff also relied on the shortness of time since Backhouse had been enlisted, and the fact of his not wearing his uniform, as negating the presumption that he had been attested.]

Attestation must by the mutiny act take place within four days after the enlistment. If it had been shown that Backhouse had only been enlisted three days instead of three weeks, perhaps it might be difficult to presume his attestation. But here he states that he was employed by Hutchinson to enlist: that surely must be sufficient. As to the uniform, that can be no part of the essence of a soldier.

[*Lord Campbell, C. J.* I think, until the contrary was proved, there was evidence from which the jury might infer that Backhouse had a right to enlist, and that the plaintiff was therefore a recruit.]

Then, there was no misdirection, for though the judge summed up strongly in favor of the presumption, he did not direct the jury to draw the inference. The next objection is, that the enlistment is void because it took place on a Sunday. But the act of 29 Car. 2. c. 7, does not apply to persons who act under the orders of others, but only to those who exercise callings on their own account. *Fennell v. Ridler*, 5 B. & C. 406; s. c. 4 Law J. Rep. K. B. 207, cited on moving for the rule, does not apply.

[*Lord Campbell, C. J.* How can enlisting be said to be the ordinary calling of a soldier? You need not argue that point any more.]

Then it is said, the omission to ask whether the person enlisted was in the militia vitiated the enlistment. But the questions specified in the 55th section of the mutiny act are for the protection of the government, not of the recruit, and are at most only directory. Backhouse did, however, in substance, ask the same question, for he asked whether he was free, able, and willing to serve as a soldier. With regard to the place of abode of the plaintiff, Backhouse being a native of the same village knew that well, as appears by his stating it to Hutchinson, and therefore the asking it would have been a mere idle form. Then, as to the plaintiff himself not being attested, the plaintiff having received the enlisting money is, by sect. 55, "deemed to be enlisted as a soldier," subject to a right under sect. 56, of going before a justice and being discharged on payment of the smart-money. That is in the nature of a defeasance. Besides, he takes advantage of his character of a soldier by receiving a billet and getting quarters, and he cannot afterwards be heard to say that he is not a soldier. *Watson v. Wace*, 5 B. & C. 153. But sect. 57 provides, that if a recruit shall receive enlisting money from *any* person employed in the recruiting service (which Backhouse clearly was) and absconds, and does not go before a justice within four days, "such recruit shall be

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deemed to be enlisted and a soldier in her majesty's service as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter under any articles of war." Here more than four days elapsed between the enlistment and the capture of the plaintiff as a deserter; therefore he became by virtue of that section liable to be treated as a deserter. After the four days, the *locus penitentiae* allowed to the recruit is gone.

The only remaining point is as to the 20th article of war. The judge did not leave the case to the jury sufficiently favorable to the defendant, for by that article a commanding officer is bound to receive and detain any prisoner brought to him by a non-commissioned officer with a written charge of crime, and it is quite immaterial for his justification whether he is rightly charged or not, or whether he is, in fact, a soldier or not. *Norris v. Seed*, 3 Exch. Rep. 782; s. c. 18 Law J. Rep. (N. S.) Exch. 300. The 20th article is express in its terms, and imposes on the commanding officer a purely ministerial duty. If he refuses to receive a prisoner brought to him, he is liable to a court martial, and he has no means of instituting an inquiry into the validity of the charge, and no mode of disposing of the prisoner in the mean time is provided.

[Coleridge, J. The words "any prisoner" must, I thought, be restricted to any soldier who is a prisoner.]

It includes any person who might apparently be guilty of an offence against the mutiny act. The offence charged against the prisoner would be subsequently investigated: the defendant stood in the light of a mere jailer, bound to detain him in the first instance. But, at all events, this plaintiff being a recruit was properly detained. It is said, for the plaintiff, that he could not be received except under a warrant of a civil magistrate; but no such limitation is to be found in the articles of war. The clauses in the mutiny act, which refer to the interference of a justice of the peace, apply to a different case, and do not restrain the plain meaning of the 20th article of war.

Montagu Chambers, O'Malley, and Dasent in support of the rule. The plaintiff being proved to have been detained in custody by the defendant, it lay on the latter to prove a justification for the imprisonment; and, unless the plaintiff is clearly made out to be a soldier, subject to the mutiny act and the articles of war, they cannot apply as a justification of the defendant's acts. The fact of the plaintiff availing himself of a billet cannot operate to justify the wrongful act of the defendant. Now, the defendant had no right at all to receive the plaintiff, except under the warrant of a magistrate.

[Lord Campbell, C. J. Do you contend for that, where the prisoner brought to him is a soldier who has deserted?]

A soldier may apprehend a deserter in the first instance, but he cannot hand him over to the depot without a warrant. Sect. 46 requires a constable to apprehend, if he is at hand, but, if not, a soldier may do so; nevertheless either of these must take the suspected person before a justice, who is then to cause him to be conveyed in civil cus-

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tody to the depot, or the justice may, if he pleases, deliver the prisoner to a party of soldiers in charge of a *commissioned* officer.

[*Wightman*, J. Suppose it is too late in the day to find a magistrate, what is to be done with the deserter?]

That question cannot arise here: but probably he might be detained in safe custody until he could be taken before a magistrate. Sect. 47 speaks of deserters being detained by jailers under a warrant of a justice. Sect. 48, which applies to a recruit deserting before he joins his regiment, also requires a justice to commit him to the nearest depot. Again, sect. 55 requires a recruit to be taken before a justice of the district where he was enlisted, not being an officer in the army, who is to see whether he has been properly enlisted, such a justice being supposed to have local knowledge of the recruit; and this justice may, by sect. 56, discharge the recruit on payment of the smart-money. All these provisions show that the legislature were most jealous in preventing any person's liberty being infringed without the interference of a civil magistrate. *Fletcher v. Calthrop*, 6 Q. B. Rep. 880; s. c. 14 Law J. Rep. (N. S.) M. C. 49. It may be an apparent hardship on the defendant to oblige him to inquire into the validity of the arrest; but he must do so unless there is a warrant of commitment. The 20th article of war does not extend to a charge of desertion, but only to civil offences which ought to be inquired into by a civil magistrate; at all events it can apply only to soldiers properly enlisted; and taking that, together with the rest of the articles and the mutiny act, it appears that the defendant had no right to deal with the plaintiff as a deserter on the mere statement that he was so by the party who brought him. According to the 20th article of war the defendant must have received a written charge of the plaintiff's crime, and if he had looked to that he must have seen that the plaintiff could not be properly charged with desertion; and therefore he ought not to have received him into his custody.

Secondly, the enlistment on a Sunday was illegal. Backhouse enlisted the plaintiff by virtue of his employment to enlist recruits; therefore it must be taken to be the exercise of his ordinary calling, and so within 29 Car. 2, c. 7.

[*Lord Campbell*, C. J. Enlistment is a contract between the queen and the soldier, entered into by an agent on behalf of the queen.]

It is the agent's ordinary calling to make the contract. Sect. 55 shows that Sunday is not to be counted in the periods limited for attesting the recruit, or giving the notice of his enlistment, and therefore it impliedly prohibits the enlistment itself on a Sunday. *Fennell v. Ridler* shows how the act of 27 Car. 2, c. 7, is to be construed, viz., not only for promoting public decency of behavior, but also for regulating private conduct, and the word "business" is to be construed largely.

Next, as to the presumption that Backhouse was properly attested. The rule relied on applies only to public functionaries, and does not include such a person as an enlisting agent. But, at all events, no presumption arises from a single act, and Backhouse was never shown

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to have acted in this capacity before. No authority can be cited to show that any presumption can be made in such a case. To apply the maxim *omnia præsuntur esse rite acta* to a matter of jurisdiction is to reason in a circle. *The King v. All Saints, Southampton*, 7 B & C. 785; s. c. 6 Law J. Rep. M. C. 53.

[Coleridge, J. Hutchinson distinctly stated that he had employed him.]

But he did not say he was "an attested soldier," which is required as well as that he was employed; that rests only on presumption. Besides, there was evidence from which the jury could see that Hutchinson did not know his duty as to attesting recruits, for it was proved that he intended to take the plaintiff before a borough instead of a county justice, and therefore it might well be presumed that he had done the same thing in the previous case of Backhouse; if so, the presumption is rebutted, especially in favor of the plaintiff, who rests on the highest known presumption, that of innocence. *The King v. Twynning*, 2 B. & Ald. 386. *Williams v. The East India Company*, 3 East. 192. The mere holding himself out as a soldier by Backhouse will not suffice to justify a deprivation of the plaintiff's liberty; he must be proved to be *de facto* a soldier. Then, the questions prescribed by section 55, not having been asked at the time of enlistment, and the plaintiff not having been taken before a magistrate for the county within four days, the enlistment became void. Neither was notice given to the plaintiff within twenty-four hours of his having been enlisted, as required by the same section. These requisites must be complied with, if this very stringent statutory power is sought to be exercised against the plaintiff. The party who recruited him informally could not be justified in what he did, and the defendant must stand on the same footing.

Cur. adv. vult.

Their lordships, differing in opinion, now delivered their judgments as follows:—

LORD CAMPBELL, C. J. I think that too large an interpretation is put upon the 20th article of war by the counsel for the defendant, when it is said that it would apply to any persons charged with a crime, whether they do or do not fall within any of the categories mentioned in the 2d section of the mutiny act. In my opinion none are bound by that act, or by the articles of war, except her majesty's forces, and I am most anxious, in a constitutional point of view, that this should be understood as my opinion. When I look to the mutiny act, and find it stated in the preamble, that it is requisite for the retaining all the before-mentioned forces in their duty, that "soldiers who shall desert her majesty's service should be brought to a more exemplary and speedy punishment than the usual forms of the law will allow," I can have no doubt that her majesty's forces, and they alone, are affected by that act and the articles of war. The second section of the act is also very material as describing the persons who shall be subject to the provisions of the act; and that section says, "or who are

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or shall be listed or in pay as a non-commissioned officer or soldier." It was for the defendant, then, to show that the plaintiff was a person subject to the mutiny act and the articles of war, and in my opinion he has done so *prima facie* by showing that the plaintiff was a soldier, and enlisted. What, then, are the objections to his character as a soldier? First, it is objected, that the person Backhouse, by whom the plaintiff was enlisted, was not himself an attested soldier. That objection is in my opinion wholly unavailing, because Backhouse acted as an attested soldier, employed for the purpose of the recruiting service, and it is to be presumed that *prima facie* he had a right so to act; besides which, it was proved by Hutchinson that he had belonged to the regiment for a much longer period than that within which he ought to have been attested. It must, therefore be presumed that he was attested, and a soldier within the meaning of the 55th section. Then, is there any evidence to repel that presumption? The only evidence is, that it was intended to have the plaintiff attested before a borough magistrate instead of before a county magistrate. I hardly think that this was even evidence to be left to the jury. It was, however, left to them, and no complaint can now be made in that respect. Another objection is, that the plaintiff himself was not attested. But it is quite clear that if he was enlisted and took the money from the person employed in recruiting, the attestation was wholly immaterial under the 57th section. Another objection is, that it does not appear that the questions required by the 55th section were put to him. It seems quite clear that that section is only directory, and does not make the legality of the enlistment to depend upon the putting of these questions. The section was passed with altogether a different intention, as is shown by the words "every person who shall receive enlisting money, knowing it to be such, shall be deemed to be enlisted as a soldier in her majesty's service." That is the main object of the clause; what follows only describes the mode in which it should be effected. The next point is one upon which the plaintiff's counsel mainly relied, namely, that the enlistment being on a Sunday, was void. It seems to me that objection is wholly untenable. It is monstrous to say that a soldier who is employed in the recruiting service comes within the scope of the 29 Car. 2, c. 7, which applies to persons carrying on trades of a civil nature, and not to the military service of the country. The ordinary duty of a soldier is to attend drill and fight the battles of his country, and in no point of view can it be said that the recruiting soldier here was exercising his ordinary calling on the Sunday. It has even been held that a contract of hiring between a farmer and a laborer on a Sunday is not within that act. *The King v. The Inhabitants of Whitnash*, 7 B. & C. 696; s. c. 6 Law J. Rep. M. C. 26. I now come to what I consider the most serious question in the case, upon which I regret to find that one of my brothers, for whose opinion I entertain the very highest respect, differs from me. This question is, whether it is a good objection that the plaintiff was not taken before a justice of the peace and a warrant obtained for his detention before he was given over to the custody of the defendant. After the most anxious consideration of the matter, I am of opinion that, although the plain-

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tiff was not carried before a justice of the peace, and no such warrant obtained, what took place was sufficient to justify the imprisonment. The action is not for the arrest and the keeping in custody until the plaintiff was delivered over to the defendant, but for the subsequent receiving and keeping in custody by the defendant. That being so, does any irregularity of that kind deprive the commanding officer of the protection of the 20th article of war? I think it does not. That would be to interpret the section as if it had said, any prisoner in legal custody or legally enlisted; whereas the words are "any prisoner committed to his charge," and it seems to me that the duty to receive and keep under that article, attaches *eo instanti* the party is brought to the commanding officer by an officer or non-commissioned officer who shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the prisoner is charged. Here this latter condition was performed, and I think no other is required. But it has been said that the 20th article applies only to civil offences, and has no application to the case of a person in custody for desertion, which is a military offence. It appears, however, that the 18th article applies to civil offences, and the 19th to "crimes," which there clearly include military crimes, and then comes the 20th article in general terms, which would, therefore, apply to military crimes just as much as to civil offences. On the whole, therefore, it seems to me that the commanding officer in this case has made out a complete defence, although I express this opinion with diffidence, differing as I do from the opinion of my brother Erle. I give no opinion as to the legality of what was done before the plaintiff was delivered over to the defendant. As to the point of surprise, I think there is no reasonable ground for making the rule absolute for that reason.

WIGHTMAN, J. There are two principal points in this case: first, as to the enlistment; and, secondly, whether the 20th article of war applies. As to the first question, it is said that although the plaintiff had received the recruiting money, knowing it to be such, and from a person employed in the recruiting service, still he was not a soldier properly enlisted as such in the service, because it did not appear that the person giving the money was himself an attested soldier. Now, it was expressly proved that the person enlisting had been employed in the recruiting service, but there was no affirmative evidence to show that all the provisions of the 55th section had been complied with, or that such person had himself been attested. It did, however, appear that not only was he recognized as a soldier employed in the service, but also that he had been more than four days with the party, and treated as a person duly enlisted, and to whom express authority was given to enlist other persons. By law he must have been long before attested; and it seems to me the ordinary rule in such cases, namely, that a person who professes to act in a particular capacity, and is treated by others as having that capacity, must be presumed to be legally qualified until the contrary is shown, must apply to this case. Then comes the other point, that it should appear that all the preliminaries required by the 55th section had been pursued. It appears to

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me that section may be considered directory; but whether that be so or not, the question here is, whether for this particular purpose the conditions must be fulfilled. [His lordship here read the section.]

It seems to me the evidence in this case is enough to raise the presumption that the plaintiff was a soldier, and enlisted as such in her majesty's service, within that section; and then we have the 20th article of war, referring in general terms to the making of the charge by an officer or non-commissioned officer, with this qualification only, that there shall be delivered an account in writing of the crime, which was done here. But it has been said that desertion is not a crime within the meaning of the 20th article. Now, the 19th article speaks of "crimes deserving punishment," in general terms, and applies to other offences than those in the 18th article; and desertion is one of the highest crimes within the 19th article. That being so, it appears to me the defendant could not safely or consistently with his duty have refused to receive a person who had been enlisted as a soldier and charged as the defendant here was; and therefore, upon both these grounds, I think our judgment should be in favor of the defendant. The other points taken have received a sufficient answer from the lord chief justice.

ERLE, J. I feel it to be my duty to deliver my opinion in this case, and I do so with very great diffidence, as each of my brothers have come to a different opinion. The question in the case does certainly involve the inquiry, whether the plaintiff was a military man or not. It is conceded by all that the mutiny act and the articles of war apply only to military men; and with respect to the plaintiff being a deserter, the point in dispute here is, whether he was a military man or not, and whether a man, who alleges that he is subject only to the civil power, shall be consigned to the military authority, until the civil magistrate has been applied to, and has regularly given his sanction to the detainer. There are many provisions which would be rendered entirely nugatory if the construction put by my brothers were correct. If the 20th article in itself justifies the commanding officer to receive and detain a man, and if it be his duty always to receive a person charged as a deserter, then a soldier, taking a man merely upon his own suspicion, may take him to a non-commissioned officer, who might then take him to the commanding officer, who would be obliged to receive him into custody. It appears to me the law is not so, when upon a charge of being a deserter, the question is raised whether a man is a military man or not. It is not necessary for me to decide whether the enlistment money was properly given and received by the plaintiff, and whether by the operation of the 57th section of the mutiny act, as the plaintiff had not attended within four days before a magistrate to be attested, he was to be deemed enlisted and a soldier, although not *de facto* so, and punishable as a deserter. The plaintiff seems to have had good reason to contest these points, as they were not relied on when he was brought up by *habeas corpus*, and the evidence upon the present trial leaves room for considerable doubts upon them; but even if it be assumed that they are made out, still it appears

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to me that the defence fails, and that, by the mutiny act and the articles of war, it is most carefully provided that the full benefit of the civil authorities shall be secured to a man situated as the plaintiff was, before he can be made a military prisoner. In the first instance, under the 46th section, if a man is suspected to be a deserter, he is to be taken, if possible, by a constable before a neighboring justice, who is to inquire whether he is a deserter or not, and if he is satisfied that he is so, he is to send him in civil custody to the nearest depot or prison, or, in a particular case, he may deliver him up to a party of soldiers of his own regiment, in charge of a commissioned officer. So that, before a man is consigned to the military authority, to be dealt with under the articles of war, it is material to observe, that he is to be taken by a constable, and a magistrate is to inquire into the matter; and the statute expressly provides that he shall be in civil custody all through, and a special duty is imposed on every jailer as to the receiving of a deserter. All the provisions of the act are extremely special in that respect.

And among the articles of war I find there is one (the 47th) to the effect that any military man, knowing of a deserter, and not giving information to the civil authority, shall be liable to be punished. Looking, then, at all these provisions, it seems to me that a soldier, taking a deserter to a non-commissioned officer, and such non-commissioned officer taking the deserter and delivering him to the commanding officer of the guard as a deserter, does not authorize the commanding officer to receive and keep him in custody, and affords no justification for so doing. If it were a justification, it would be the duty of the commanding officer in every case to receive a man brought to him by a non-commissioned officer, and all the provisions with respect to the civil authority would be rendered nugatory. I find also that the act with respect to her majesty's marine forces contains similar provisions; and they, too, would be rendered in the same way inoperative if such be the true construction. As to the effect of the 20th article of war, I think it must be read with reference to the 18th and 19th, the articles being arranged into divisions, and the 18th, 19th, and 20th being in the division headed "Proceedings on commission of offences." They must be construed as one enactment with relation to crimes; and with respect to the latter two, the objection is not that they relate only to civil offences, but to offences committed by soldiers *de facto*, and not persons whose qualification as soldiers is disputed, and, in respect to whom, when charged as deserters, a special provision in respect of imprisonment has been before made. The 19th article most certainly may apply to desertion; but only after a man has been placed in custody according to the known laws of the land or the articles of war. It seems to apply to all military offences, but only to those persons who are officers and soldiers *de facto*. It must be considered with the other special provisions, when those special provisions have a special application. The 20th article applies to persons who have become prisoners in the manner in which this particular division of the articles of war had shown that a man may be a prisoner, and the commanding officer

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who receives the prisoner is bound to have an account in writing of the crime which would authorize him to detain such prisoner. I therefore think, that according to the provisions of the mutiny act, which must be taken to have been known to the defendant when Hutchinson brought the plaintiff to him, and stated the account of the crime charged, the defendant ought to have said that he had no authority to receive him; otherwise, it would be the duty of every commanding officer to receive every person so brought before him. There may be a great deal of hardship alleged on the part of the defendant, but I think the same may be equally said on the part of the plaintiff. But whether that be so or not, our duty is to find out clearly, if we can, what the law is, and to declare that law; and so viewing all the circumstances of this case, I think that the defendant has failed to make out his defence, having no right as commanding officer to detain the plaintiff. All the other questions only bear upon the point of the plaintiff's having been delivered as a prisoner by Hutchinson to the defendant, and it becomes unnecessary for me to refer to them further.

COLERIDGE, J. The trial of this case having taken place before me, it is unnecessary for me to say any thing as to the point upon which the court are agreed. But, as to the point upon which they differ, it is right I should express my opinion, as it involves a great and important constitutional question. I agree with the majority of the court, and I may say entirely for the reasons already stated. I need not, therefore, go into the particular grounds of their opinion, and the more so as I do not consider it necessary to say whether the regular course was pursued from the commencement of the time when the plaintiff was taken into custody. The question here is, whether Major Gavin is well defended as to liability from the time when he received the plaintiff into his custody; and in my opinion he is well defended under the 20th article of war, if a prisoner subject to military law was brought before him by a person who was on the list of non-commissioned officers, and that officer stated in writing the crime with which he charged such prisoner, and it appeared to be a criminal offence. I was pressed at the trial to give the 20th article a more unlimited construction; and I shall only say, in passing, that a very important constitutional limitation is put upon the very large words of this article in giving to it the meaning that has been conceded, namely, that it extends to military offences only; and what further limitation can be put upon it in the case of the commanding officer, who is called upon to act under it? Whether all the proper steps have been taken by the person by whom the prisoner comes into his custody, he has no means given him of ascertaining. It is said, that a jailer would not be justified in receiving the plaintiff. Doubtless, he would not be justified if the warrant upon the face of it appeared to be irregular and bad; but if good on the face of it, he is not liable, and he is not bound to inquire into the previous facts. I think this case stands at least upon this latter footing. It is, however, further objected that Major Gavin, in addition to what

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was done, should have required the warrant of a civil magistrate. Does that appear upon the face of the article of war? If it does not, and if it is necessary, the article of war becomes a sort of trap. The 20th article in terms does not require any such warrant, and, in effect, to insert words for that purpose, would be an interpolation which we are not warranted in making, and somewhat unreasonable. Why deliver a warrant besides the writing of the charge that the non-commissioned officer is required to deliver? This being, in my opinion, the proper construction, I think there was evidence for the consideration of the jury, and that the verdict is quite right.

Rule discharged.

DOE d. WHITTY v. CARR.¹

December 3, 1850.

Practice — New Trial, Time of moving for.

Where a party has obtained a rule *nisi* for a new trial by leave of the court, after the expiration of the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the court will not permit the rule to be made absolute, if the objection is raised on showing cause.

Quære, whether an application to set aside the judgment might not have been made promptly.

In this case a verdict was obtained, for the plaintiff, at the York summer assizes, 1849. In the ensuing Michaelmas term, a rule *nisi* was obtained, on behalf of the defendant, for a new trial. The case had been inserted within the first four days of that term in the list of motions to be made, and the motion was actually made and the rule *nisi* granted on the 9th of November; but no notice was given to the plaintiff's attorney that the motion would be made after the expiration of the first four days of the term, as required by the regulation of all the courts.

On the 10th of November, judgment was signed for the plaintiff, and a notice to tax costs was given to the defendant's attorney on the 13th of November. He attended the taxation on the 14th of November, and did not then mention the fact of there being a rule for a new trial. The rule *nisi* was not drawn up or served until the 5th of December. Shortly afterwards, a writ of *habere facias possessionem* and a *fi. fa.* for the costs issued, and were executed.

Hugh Hill, who appeared to show cause against the rule, objected that, according to the case of *Doe d. Howe v. Thornton*,² in this court,

¹ 20 Law J. Rep. (N. S.) Q. B. 83.

² In that case, a verdict having been obtained for the plaintiff, a rule *nisi* to enter a nonsuit pursuant to leave reserved at the trial, was moved for on the 22d of January, 1849, the main objection being that the devise under which the lessor of the plaintiff

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the plaintiff's rule must be discharged, on the ground that he ought to have given notice of his intention to move after the first four days of term, and that, not having done so, the verdict and judgment and execution thereupon could not now be set aside.

Pashley, in support of the rule. The object of the rule of court is only to prevent a judgment being set aside as irregular, which has been signed without notice that any motion is about to be made. In *Boulter v. Brooke*, 19 Law J. Rep. (N. S.) C. P. 190, (not reported on this point,) the court of common pleas heard a case moved under similar circumstances, and considered that the only difference to be made on account of the want of notice was whether they should impose terms on the party seeking to set aside the judgment.

[*Coleridge*, J. Ought you not to have moved to set aside the judgment, when you knew on the 13th of November that it had been signed?]

According to the case cited, that is unnecessary. The court will consider that point in disposing of the rule.

[*Erle*, J. Here a new tenant may have taken possession of the premises, and it would be hard now to set aside all the proceedings on which his possession is founded.]

PATTESON, J. I do not know what were the circumstances of the case in the common pleas; but in this court we have considered, that where a judgment has been signed under circumstances like the present, the party against whom it has been signed cannot be heard to support a rule for a new trial. It is plain that in this case there was ample time to move to set aside the judgment during the term in which it was signed, for the defendant's attorney attended the taxation of costs, and never mentioned the rule. It is a much better practice where a regular judgment has been signed that the party should get rid of it before he can be heard upon his irregular rule for a new trial.

had recovered was void, as it was in trust for the propagation of the works of Joanna Southcot. No notice of the intention to move was given by the defendant within the first four days of the term, and the lessor of the plaintiff signed judgment in ignorance of any such motion being about to be made. In Hilary term, 1850,—

Lush appeared to show cause, and objected that the court would not set aside the judgment which had been signed regularly,—at all events, without an affidavit of merits.

Cox, in support of the rule, contended that, as it was a mere question of law, the court would not require an affidavit of merits from the defendant, but offered to pay the costs of signing the judgment.

PATTESON, J. If the devise is void, the defendant may bring an ejectment and recover the property; but the rule of court has not been complied with, and we cannot let in a defendant to argue the rule where he has not a shadow of a possessory right. The judgment has been signed regularly, and we cannot set it aside.

COLERIDGE and *EARLE*, JJ., concurred.

Rule discharged.

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COLERIDGE, J. I give no opinion upon the case in the common pleas without knowing its circumstances more *in extenso* than I do at present. But I decide upon the rule of court by itself. It is clear that this is a regular judgment, and we could do nothing effectual in favor of the defendant without setting it aside. A writ of possession has also been executed, under which the lessor of the plaintiff has remained quietly in possession of the property until now. If, therefore, we had heard the case discussed, we should be very disinclined to disturb the judgment. But, besides, it is much more convenient and agreeable to justice, that a judgment which is intended to be set aside, should be impeached in the regular way. Here the present tenant may have put crops in the ground before he received intimation of any steps to be taken to dispute the verdict. Therefore, on the principle that the rule has not been complied with, we hold that the defendant cannot be heard.

ERLE, J. I also think that the general rule must prevail, that a party who means to apply to set aside a judgment which has been signed regularly, should do so without unreasonable delay. Here we can do nothing unless we set aside the judgment, and I see no reason for excepting this case from the general rule. The rule *nisi* was no doubt moved for before the judgment was signed; but a rule only becomes operative from the time when it is served, and that was not until the 5th of December, long after the judgment had been signed, and before which day the lessor of the plaintiff had taken steps to issue execution. Therefore, the defendant ought not to be heard.

Rule discharged.

THOMPSON v. NYE.¹

December 5, 1850.

Evidence, Admissibility of — Character — Slander.

In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant, on cross examination, asked a witness, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?"—

Held, that the question was improper, as it was not confined to rumors existing before the words were spoken by the defendant.

Quære, however, whether the question could have been allowed if it had been so limited.

SLANDER. The declaration was in the ordinary form, and averred that the defendant, intending, &c., falsely and maliciously spoke of and concerning the plaintiff certain words imputing to him the commission of an unnatural offence, whereby the plaintiff had been greatly injured in his good name, credit and reputation, &c.

¹ 20 Law J. Rep. (N. S.) Q. B. 85.

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Plea — Not guilty.

At the trial, before Wilde, C. J., at the Surrey spring assizes, 1850, the defendant proposed to ask, in cross examination of the witness who proved the defamatory words, the question, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?" This question was objected to as improper, and the learned judge refused to allow it to be put. The jury returned a verdict for the plaintiff. In the ensuing term, a rule *nisi* was obtained for a new trial, on the ground that this question ought to have been admitted; against which

Hawkins appeared to show cause; but the court called upon

Parry, to support the rule. The proposed evidence was admissible in mitigation of damages, and to contradict the general averment of good character contained in the declaration. Similar evidence was admitted for this purpose in *The Earl of Leicester v. Walter*, 2 Camp. 251. — *v. Moor*, 1 M. & S. 284. Taylor on Evid. 256. In 2 Stark. Evid. p. 641, 3d ed., the question as to admitting such evidence is fully discussed, and two *nisi prius* cases, where it was admitted, are there cited. In *Snowdon v. Smith*, 1 Ibid. 286, *n.*, evidence of the kind was rejected where there was a justification; but general averments of this nature could not be pleaded as a justification, *Jones v. Stevens*, 11 Price, 235; and this distinction is clearly taken in *Speck v. Phillips*, 5 Mee. & W. 279; s. c. 8 Law J. Rep. (N. S.) Exch. 277, where Lord Abinger says, that whatever is not a justification of the act complained of, may be evidence to diminish the damages. *Waithman v. Weaver*, Dowl. & Ry. N. P. 10; and *Williams v. Callender*, Holt's N. P. 307.

[*Wightman, J.* These very rumors may have originated from the defendant's publication. Therefore, the question, if admissible at all, should be limited to rumors prevalent before the defendant's act.]

In — *v. Moor* the question was put generally: it is admissible on the same principle as expressions used after the publication of a libel, viz., to show the *animus* of the defendant. Rumors existing after the defendant's act may be evidence from which the jury may infer that the plaintiff was guilty of the practices imputed to him before that time.

[*Patteson, J.* That assumes the rumors to be true, which you have no right to do without giving the plaintiff an opportunity of answering.]

The plaintiff's character is damaged by the existence of the rumors, and therefore he cannot have a right to recover such large damages as one whose reputation is untouched. Character is the very essence of this action.

[*Erle, J.* In *Richards v. Richards*, 2 Moo. & R. 557, the question was limited as suggested.]

PATTESON, J. Without deciding the general point, it seems to me that at all events the question should have been confined to rumors

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existing at the time of the publication of the slander by the defendant; otherwise, a person might slander another, and then call some of the neighbors to say that they had heard the imputations which he had himself set afloat. We must guard against such mischief, even if the evidence is admissible at all, as to which I say nothing. On this ground, therefore, the rule should be discharged.

COLERIDGE, J. I apprehend that when a question is admissible only if put in a qualified form, a party who chooses to put it generally cannot do so and leave it to his antagonist to limit the effect of the question afterwards. According to all the authorities, this question was put in too general a form. With my brother Patteson, I abstain from giving any opinion on the general admissibility of such evidence. At the same time, I should be sorry to have it thought that I should be favorable to admitting the question even in its most limited shape.

WIGHTMAN, J. This question seems open to objection, as I have already said, as the rumors to which it points may have been occasioned by the act of the defendant himself. Such a general question seems in one reported case only to have passed without objection; — *v. Moor*; but the decision there turns expressly on the previous case of *The Earl of Leicester v. Walter*, where the rumors were existing before the slander complained of, and possibly the case may have there been the same.

ERLE, J. I also have no doubt that the general question is inadmissible. It is not necessary to decide whether it could be evidence in a modified form. Many judges have admitted such questions at *nisi prius*; but in the only case where the law was reviewed, it was not the interest of the plaintiff to contest it. In *Jones v. Stevens*, however, there is a deliberate opinion of a court that such evidence cannot be given. Therefore, the rule must be discharged.

*Rule discharged.*¹

¹ In America, the weight of authority is in favor of admitting evidence of the general bad character (reputation?) of the plaintiff in an action for slander, as affecting the question of damages. 1 Greenl. Ev. § 55, and cases cited. There might have been another objection to the question put in this case, besides those noticed by the

court, viz., that the question was not sufficiently *general* in respect to the currency of the rumors. It is said not to be a proper question in impeaching a witness's character for truth and veracity, to ask, as was done in this case, merely what *others* say of him; but the inquiry must be, what is *generally* said. 1 Greenl. Ev. § 461.

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REGINA v. THE INHABITANTS OF MINSTER.¹

December 6, 1850.

Pauper Lunatic — Maintenance — 8 & 9 Vict. c. 126, s. 62 — Jurisdiction of Justices — Certificate of Surgeon — Notices of Chargeability — Order, Validity of.

Where an order for the payment of expenses and maintenance of a pauper lunatic is made, under the 8 & 9 Vict. c. 126, s. 62, upon the parish in which he is adjudged to be settled, no notice of chargeability is required to be sent by the parish obtaining the order; the requirement of a notice of chargeability being a regulation relating to removals, and not to appeals against removals, and therefore not incorporated into the 8 and 9 Vict. c. 126, s. 62.

The order of maintenance recited a prior order for the removal of the lunatic to the asylum, and an order adjudging his settlement to be in the appellant parish, and stated that the pauper, from the time of being sent to the asylum to the time of making the order of maintenance, had been maintained at the expense of the appellant parish: —

Held, that it sufficiently showed that the pauper was chargeable.

The certificate upon which a pauper lunatic was removed to an asylum under the 8 & 9 Vict. c. 126, s. 48, purported to be, and was in fact, given by a surgeon, but it did not follow the form in schedule E, No. 1, to that act, in stating that he was a member of the College of Surgeons, &c., or in giving his place of abode: —

Held, that although the keeper of the asylum might be guilty of a misdemeanor, under sect. 51, for receiving the lunatic without a certificate in the prescribed form, yet the confinement did not thereby become unlawful, and the lunatic being *de facto* confined in the asylum, the jurisdiction of justices to adjudge the settlement under sect. 58, and to make an order for costs under sect. 62, attached.

UPON the appeal of the church-wardens and overseers of the poor of the parish of Minster, in the county of Cornwall, against an order of two Justices for the maintenance of a pauper lunatic, the Court of Quarter Sessions for the said county confirmed the order subject to the opinion of this Court on a case.

The order appealed against was as follows: —

“Cornwall, to wit. To the church-wardens and overseers of the poor of the parish of Lanteglos-by-Camelford, in the county of Cornwall, and to T. F., treasurer of the guardians of the poor of the Camelford Union, in the said county of Cornwall. Whereas, by a certain order of S. C., one of her Majesty's Justices of the Peace in and for the county of Cornwall, made on the 17th of July, 1847, and directed to the superintendent of the Lunatic Asylum in and for the county of Cornwall, reciting that the said S. C. having called to his assistance a surgeon, and having personally examined Joanna Davey, a pauper, and being satisfied that the said J. Davey was an insane person, and a proper person to be confined, the said S. C. thereby directed the said superintendent of the Lunatic Asylum aforesaid to receive the said J. Davey as a patient into the said asylum. And whereas, by a certain other order under the hands and seals of us, the undersigned J. B. and S. C., &c., bearing even date herewith, after reciting the said first-mentioned order, and reciting that the said J. B. and S. C. had then, in pursuance of the statute, &c., inquired into

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the last legal settlement of the said J. Davey, so ordered to be confined in the said asylum as aforesaid, and satisfactory evidence upon oath being then given before us that the parish of Minster, in the county of Cornwall, is the place of the last legal settlement of the said J. Davey: We, the said J. B. and S. C., Justices as aforesaid, did thereby adjudge that the said parish of Minster was the place of the last legal settlement of the said J. Davey. And whereas the said parish of Minster is one of the parishes included and comprised in the said Camelford Union. And whereas complaint hath been made unto us, the said J. B. and S. C., two of her Majesty's Justices of the Peace, in and for the said county of Cornwall as aforesaid, (in which said county the parish of Lanteglos-by-Camelford, from which the said J. Davey was sent to the said Lunatic Asylum, is situate,) by the church-wardens and overseers of the poor of the said parish of Lanteglos-by-Camelford, that they, on behalf of the said parish of Lanteglos-by-Camelford, have incurred great expense in and about the examination of the said J. Davey, and in and about her conveyance to the said asylum, and that they have paid divers sums of money to the treasurer of the said asylum, for the lodging, maintenance, medicine, clothing, and care of the said J. Davey in the said asylum, where she hath ever since been and now is confined, at the charge and expense of the said parish of Lanteglos-by-Camelford. And whereas the said church-wardens and overseers of the poor of the said parish of Lanteglos-by-Camelford therefore now make application unto us, the said Justices, for an order upon the treasurer of the guardians of the poor of the said Camelford Union, (in which the said parish of Minster is included and comprised as aforesaid,) for payment to the said church-wardens and overseers of the poor of the said parish of Lanteglos-by-Camelford of the amount of the said expenses, and of the moneys so paid by them to the treasurer of the said asylum as aforesaid; and it being now satisfactorily proved unto us, the said Justices, upon oath, that the said church-wardens and overseers of the poor of the said parish of Lanteglos-by-Camelford have heretofore, and within twelve calendar months before the making of this order, paid the following sums in respect of the said lunatic, J. Davey, that is to say, &c., We do, therefore, order you, the treasurer of the guardians of the poor of the said Camelford Union, to pay forthwith unto the church-wardens and overseers of the poor of the said parish of Lanteglos-by-Camelford the said several sums, &c. And we do further order you, the said treasurer of the guardians of the poor of the said Camelford Union, also to pay weekly and every week unto the treasurer of the said asylum the sum of 7*s.*, or such other sum as the committee of visitors of the said asylum shall hereafter fix, for the future lodging, maintenance, medicine, clothing, and care of the said lunatic, J. Davey, during such time as such lunatic shall remain and be confined in the said asylum, which said weekly sum of 7*s.* hath been this day duly proved on oath to be the weekly sum now fixed by the committee of visitors of the said asylum, and appears to us, the said Justices, to be a reasonable charge in that behalf," &c.

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The following were, amongst others, the grounds of appeal: Fourth, that the said order now appealed against is bad, because it does not appear on the face thereof that the said J. Davey, the alleged lunatic, was chargeable to your said parish of Lanteglos-by-Camelford at the time she was, as is therein alleged, ordered to be removed from your said parish of Lanteglos-by-Camelford to the said Lunatic Asylum. Seventh, that the said order now appealed against is bad in this, because the medical certificate attached to the said order of the 17th of July last, also produced to the said Justices when they made the said order now appealed against, and on which certificate, amongst other documents, the said Justices acted when they made the said order now appealed against, is bad and defective on the face thereof, inasmuch as such certificate is not made according to the form contained in the schedule E, No. 1, annexed to the act 8 & 9 Vict. c. 126, as is required by the said act, it not being stated in such certificate that E. L. West, who signed the same, was a Fellow or Licentiate of the Royal College of Physicians in London, or a graduate in medicine of any university, or a member of the Royal College of Surgeons in London, or an apothecary duly authorized to practise by the Apothecaries Company in London; and because the place of abode of the said E. L. West is not stated on the said certificate as required by the said act. Eleventh, that a notice in writing of the said alleged lunatic being chargeable to your said parish of Lanteglos-by-Camelford was not sent by you to us, with the duplicate of the said order now appealed against, and the copies of the examinations on which such last-mentioned order was made.

The following is a copy of the medical certificate referred to in the seventh ground of appeal: "I, E. L. West, *being a surgeon*, do hereby certify that I have this day personally examined J. Davey, the person named in the accompanying statement and order, and that the said J. Davey is an insane person, and a proper person to be confined. (Signed) E. L. West.

"Dated the 17th of July, 1847."

It was admitted by the respondents, on the hearing of the said appeal, that, as alleged in the eleventh ground of appeal, they, the said respondents, had not sent to the appellants any notice of the said pauper being chargeable to or relieved in the said parish of Lanteglos-by-Camelford, unless such notice were sent as follows, to wit, by the said respondents having sent to the appellants a duplicate of the said order so appealed against, and a copy of the examinations on which the said order was made.

The examinations were set out in the case, the only material part being that of James Davey, who stated, "I applied to the board of guardians of the Camelford Union for an order for my daughter to go to the asylum; and on the 21st of July last, she was removed from my home at Candolden Gate, in the said parish of Lanteglos-by-Camelford, by Mr. G. E., to the county Lunatic Asylum in and for the said county of Cornwall, by an order under the hand of S. C., one of her Majesty's Justices of the Peace for the said county, and she is

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now confined therein. I know Mr. E. West, of Camelford, surgeon. I did not pay him for attending my daughter. I am unable to support my said child Joanna, and have not contributed to her maintenance since she has been so confined in the said county Lunatic Asylum." The examination of W. R., the relieving officer of the Camelford Union, stated, "I gave Mr. E. West, the medical officer of the Camelford district of the Camelford Union, a medical order in writing to attend the said J. Davey, who was then residing in the said parish of Lanteglos-by-Camelford, and to supply her with necessary medical relief. J. Davey is the person mentioned in the certificate of chargeability now produced, marked A. Such certificate was signed by W. C., the chairman of the said union, and countersigned by C. H., the clerk thereof," &c.

The following is the certificate referred to in the examination of W. R.:—

A.

"The board of guardians of the poor of the Camelford Union do hereby certify, that on the 17th of July, 1847, J. Davey, single woman, became chargeable to the parish of Lanteglos-by-Camelford in the said union, and is still chargeable thereto. In testimony whereof, the common seal of the said guardians is hereunto affixed at a meeting of their board, this 4th of February, 1848.

(Signed) W. C., Presiding Chairman of the said Board.

(Countersigned) C. H., Acting Clerk to the Board of Guardians of the Camelford Union."

The only documents ever sent by the said respondents to the said appellants consisted of and were the several examinations on which the order appealed against was made as aforesaid, and the said duplicate of the said order so appealed against.

If the Court should be of opinion that the above objections, or any or either of them, ought to have prevailed, the order of Sessions and the order of maintenance to be quashed; otherwise, confirmed.

Butt, in support of the order of Sessions.¹ The first objection is, that the order is bad, because it does not appear from it that the pauper was chargeable to the appellant parish at the time when she was removed to the asylum. But that cannot affect the validity of this present order, which recites a previous order sending her to the asylum, and an order adjudicating her settlement in the appellant parish. The jurisdiction to adjudge the settlement and to order maintenance attaches wherever the lunatic is confined in the asylum. *The Queen v. Rhyddlan*, 19 Law J. Rep. (N. S.) M. C. 110.

[ERLE, J. No chargeability need exist to warrant a Justice in sending a lunatic to an asylum; therefore the prior proceeding need not show chargeability.]

Sect. 58, of 8 & 9 Vict. c. 126, enables Justices to adjudge the

¹ November 13, before LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

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settlement, in order to do which, they must find that the pauper is chargeable, and it is a necessary inference from the facts stated in this order, that the lunatic is chargeable to Minster. There is no objection that she was not in fact chargeable. The defect, if it exists, is merely formal. Next, it is said that the form in the schedule E, No. 1, to 8 & 9 Vict. c. 126, has not been complied with in the surgeon's certificate. But the form is not imperative; jurisdiction does not depend upon its being literally followed. The Justices must have been satisfied that the person removed was a lunatic, as they recite in their first order; and the lunatic being confined lawfully in the asylum, the Justices had jurisdiction to inquire into her settlement under sect. 58; and the lunatic having been sent to the asylum, and her settlement ascertained, the Justices had jurisdiction to order payment of the expenses under sect. 62.

[COLERIDGE, J. The appellants say that this, being a statutory power, should be strictly exercised.]

Sect. 48 only requires the Justices to "call to their assistance a physician, surgeon, or apothecary;" and this certificate does purport to be given by a surgeon.

[ERLE, J. In *re Shuttleworth*, 9 Q. B. Rep. 657; s. c. 16 Law J. Rep. (N. S.) M. C. 18, the Court refused to discharge a lunatic on *habeas corpus*, because the form given in the schedule to 8 & 9 Vict. c. 100, had not been followed literally.]

The present case stands on the same principle. The confinement is not illegal, and will, therefore, support the subsequent proceedings.

[COLERIDGE, J. Would it be enough if the certificate were by a surgeon, but did not state that he was so?]

Yes; in the present stage of the proceedings. — *The Queen v. Wolverhampton*, 19 Law J. Rep. (N. S.) M. C. 25.

[LORD CAMPBELL, C. J. At what time should the objection have been taken? The present appellants knew nothing of the removal to the asylum until this order was made. Therefore it can hardly rest on any waiver by them.]

If that be so, it is submitted that the omission is immaterial, and cannot affect the validity of the proceedings. A certificate for the removal of a lunatic to an asylum, under 8 & 9 Vict. c. 100, is not a judicial proceeding which can be removed by *certiorari*. *The Queen v. Hatfield Peverel*, 18 Law J. Rep. (N. S.) M. C. 225. Therefore, neither is a surgeon's certificate a matter at all affecting the jurisdiction of the Justices. The keeper of the asylum may be guilty of a misdemeanor, under sect. 51, for receiving the lunatic without a proper certificate, but the jurisdiction to make an order for maintenance is untouched by that fact. Lastly, it is objected, that no notice of chargeability was sent with the copy of the order and examinations to the appellants. But no such notice is required, as this is not a removal, in which case only the sending a notice of chargeability is made a condition precedent to removing the pauper, by 4 & 5 Will. 4, c. 76, s. 79. *The Queen v. The Justices of Middlesex*, 5 Dowl. & L. P. C. 9; s. c. 16 Law J. Rep. (N. S.) M. C. 109, shows that the provisions of the Poor Law Acts are to be incorporated into lunatic

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proceedings only so far as they are applicable to such proceedings. *The Queen v. The Justices of the West Riding of Yorkshire*, 15 Law J. Rep. (N. S.) M. C. 52.

Pashley, contra. First, the omission of the order to state chargeability at the time of the removal to the asylum is fatal, as that goes to the whole foundation of the Justices' jurisdiction. Secondly, the order cannot be supported as to the repayment of past expenses or for future maintenance, because there never was any proper reception into the asylum under a medical certificate given in the form prescribed by the schedule. The object of the legislature in stat. 8 & 9 Vict. c. 126, was to protect both the lunatic himself, and also the pecuniary interests which are involved in his maintenance; therefore certain forms must be complied with before he can be legally placed in an asylum so as to charge a parish with his maintenance. By sect. 57, the lunatic is to be deemed chargeable to the parish from which he is sent until his settlement is ascertained; and sect. 48, under which the prior order in this case was made, requires him to be chargeable to the parish applying. In order, therefore, to constitute such a chargeability, the lunatic must have been placed in the asylum according to the statute; otherwise the Justices have no jurisdiction to make an order for maintenance under sect. 62. In *The Queen v. Rhyddlan* the Court merely decided that a Justice, having a pauper before him, had power to send him to an asylum without an information and regular summons to bring him up. There the preliminary proceedings would have been simply nugatory. But the case of *The King v. Great Salkeld*, 6 M. & S. 408, shows, that if the order removing the pauper to the asylum were obtained improperly in the first instance, it cannot operate to relieve the parish from the burden of maintaining the pauper.

[LORD CAMPBELL, C. J. You must argue that the mere omission in the certificate vitiates the whole proceedings.]

That is so: the appellants have no means of knowing whether the party certifying was duly qualified or not, except from what appears in the certificate itself, which ought to state the facts truly. According to the argument of the respondents, there need be no certificate at all if the lunatic has been received into the asylum, and is *de facto* there when the Justices adjudge his settlement and make the order for costs. But that is directly contrary to sect. 51, which prohibits any pauper being received without such a certificate as is given in the schedule. The fact that such a certificate could not be removed by *certiorari* does not touch the question, except so far as it shows that the objection can only be raised on appeal. In *re Shuttleworth* there was sufficient to justify the detention of the lunatic at common law. But this case turns solely on the powers given by the 8 & 9 Vict. c. 126, which must, according to the general rule, be strictly pursued.

[COLERIDGE, J. Though the keeper of the asylum may be guilty of a misdemeanor for receiving the lunatic without a certificate, is not the fact of her being actually confined there sufficient to found the subsequent proceedings?]

The removing parish cannot, under such circumstances, relieve itself of the liability under sect. 57.

[COLERIDGE, J. That section applies only where a pauper lunatic is confined under the provisions of the act.]

[ERLE, J. The power to inquire into the settlement of a lunatic in an asylum under sect. 58, and to order costs of maintenance under sect. 62, applies equally whether the lunatics are chargeable or not.]

Sect. 62 does not apply, except the lunatic has been legally sent to an asylum. *The Queen v. The Justices of Cornwall*, 2 Dowl. & L. P. C. 775; s. c. 14 Law J. Rep. (n. s.) M. C. 46.

Lastly, a notice of chargeability should have been sent to Minster, according to the provisions of 4 & 5 Will. 4, c. 76, s. 79.

[LORD CAMPBELL, C. J. Of what possible benefit could such a notice be when the pauper is in an asylum?]

It is peremptorily required by the statute, and therefore must be sent.

[ERLE, J. It is only required where a pauper is about to be removed. Suppose the case of a pauper lunatic not chargeable under sect. 40; how could such notice be there necessary?]

It is only to be sent where it is possible, as it is here. But *lex neminem cogit ad impossibilia*. Sect. 62 incorporated all the provisions of the Poor Law Acts as to appeals against orders of maintenance, and this, being one of those provisions, must be observed. *The Queen v. The Justices of Middlesex* has decided that copies of examinations must have been sent, and every one of the arguments which applies to sending a copy of the examinations applies with equal force to a notice of chargeability. The object of the legislature has been to secure uniformity of proceeding in orders of removal and orders for maintenance of pauper lunatics, and therefore the 11 & 12 Vict. c. 31, has been held to apply to the latter cases. *The Queen v. The Justices of Glamorganshire*, 18 Law J. Rep. (n. s.) M. C. 118. — *Cur. adv. vult.*

Judgment was now delivered by

LORD CAMPBELL, C. J. In this case the appellants relied on two objections in respect of chargeability: First, that notice of chargeability had not been sent, as is required where a pauper is to be removed. This objection fails because the regulations relating to orders of removal are not applied to orders for maintenance of lunatics, although the regulations relating to appeals against the former orders are applied to appeals against the latter orders. Now, the requirement of a notice of chargeability is a regulation relating to removals, and not to appeals against removals. Also, if such notice were necessary, the statement contained in the examinations that the pauper was chargeable when sent to the asylum, and had been since supported therein at the expense of the parish, would be sufficient. The second objection was, that there was no adjudication of chargeability; but, as it is adjudged that the pauper had been, from the time of being sent to the asylum to the time of making the order, maintained at the expense of the parish, this objection fails. The third objection was, that the medical certificate by the surgeon did

not follow the form given in schedule E of the statute, as he is not stated to be a member of the Royal College of Surgeons, and his residence is not added, it being contended that the confinement was therefore unlawful, and, consequently, the order for maintenance made without jurisdiction. But we are of opinion, that the confinement did not become unlawful by reason of this irregularity in the form of the medical certificate. The examinations show that all the substantial facts necessary for sending a pauper lunatic to an asylum existed. It was not contended, that the surgeon was not in fact qualified, or that his residence was not known; and as he appears by the examinations to be the surgeon of the union to which the appellant parish belongs, the contrary is to be presumed. The keeper of the asylum ought to have required a certificate according to the form in schedule E, before he received the pauper and incurred responsibility by omitting to do so under the 51st section; but after he had received her with the imperfect document, and the confinement had begun, we think it was his duty to continue that confinement till the lunatic should be discharged. In *re Shuttleworth*, the Court refused to discharge a lunatic brought up by *habeas corpus* on account of defects in the certificate for confinement under the 8 & 9 Vict. c. 100, and held the confinement lawful, though the provisions requiring the form of the certificate are the same in both statutes. In *The Queen v. Hatfield Peverel*, among other objections to an order for maintenance, an alleged defect in a certificate for confinement under the 8 & 9 Vict. c. 100, was relied on, but the objection was not sustained. In *The Queen v. The Carnarvon and Anglesea Union*, 3 New Sess. Cas. 708, an appeal against an order for maintenance, on account of an omission of some of the preliminaries for an order for sending to an asylum under 8 & 9 Vict. c. 126, failed. As the pauper lunatic was *de facto* confined, and as that confinement was not unlawful, the jurisdiction for adjudicating on the settlement under sect. 58, and for making an order for maintenance under sect. 62, attached; the sect. 58 applying to all cases of pauper lunatics confined or ordered to be confined in an asylum, and sect. 62 applying in all cases of pauper lunatics sent to an asylum when the settlement shall have been adjudged under sect. 58. As all the objections fail, the order of Sessions is confirmed. — *Order of Sessions confirmed.*

Regina v. Kenealey.

REGINA on the Prosecution of THE GUARDIANS OF THE WEST
LONDON UNION v. KENEALEY.¹

November 23, 1850.

*Indictment, Removal of, by Certiorari — Costs — 5 W. & M. c. 11, s. 3
— Civil Officers concerned to prosecute — Guardians of the Poor.*

The guardians of a union preferred an indictment for an assault against the putative father of a child, which was found wandering alone within the union, and was taken by the relieving officer to the union workhouse; the father had applied to the guardians to give up the child to him, and offered to pay the expenses incurred. Defendant removed the indictment by *certiorari*, and was convicted:—

Held, that the guardians were entitled to costs under sec. 3 of stat. 5 & 6 Will. & M. c. 11, as civil officers whom it concerned to prosecute.

In order to entitle a prosecutor to costs under that section, it is sufficient to show that he prosecuted in pursuance of some moral obligation, and was not a mere volunteer.

THIS was an indictment for an assault preferred and found at the Central Criminal Court. The defendant had removed the indictment into this Court by *certiorari*, and was on the trial found guilty. A side-bar rule was thereupon obtained, on the part of the prosecutors, for their costs under 5 W. & M. c. 11, s. 3, and a rule *nisi* was subsequently obtained to discharge this side-bar rule, upon the grounds that the prosecutors were not entitled to their costs under that section.

It appeared from the affidavits on which this rule was moved for, that the indictment was preferred under the following circumstances: A child was found by a policeman in one of the streets of the city of London, in a state indicating that it had been much beaten and ill treated, and with the appearance of a cord having been tied tightly round its neck. It was taken before one of the aldermen sitting at Guildhall, who directed it to be carried to the workhouse of the West London Union, where it was accordingly received and medical assistance and care was provided for it. The guardians of the union, upon information that the injuries had been occasioned by the defendant, the father of the child, made a charge against him at the Guildhall, in consequence of which he was committed to take his trial, and the indictment was preferred by the guardians of the union. At the trial there was no evidence to connect the defendant with the marks on the child's neck, and it appeared that he had generally treated the child with kindness, although he had, for the purpose of correction, chastised it excessively.

Crowder (with him was *Huddleston*) showed cause. First, the guardians of the union were, *ex officio*, bound to prosecute; they prosecuted the defendant for an act done "that concerned them, as officers, to prosecute," within sect. 3 of stat. 5 & 6 Will. & M. c. 11. In *Rex v. Kettleworth*, 5 T. R. 32, which was an indictment by a justice of the peace for the non-repair of a road which the defendant

¹ 20 Law J. Rep. (N. S.) M. C. 53. 15 Jur. 55.

was bound to repair *ratione tenuræ*, Lord Kenyon said "This is a remedial law; not, indeed, to be extended beyond, but as little to be restrained within, the fair import of it." [Coleridge, J.—In *Rex v. Sharpness*, 2 T. R. 47, Buller, J., said, (p. 48,) "The Court has always construed this act of Parliament as strictly as possible."] Buller, J., was part of the Court, when *Rex v. Kettleworth* was decided. The guardians were as much concerned as the Metropolitan Commissioners of Police, in *Reg. v. The Earl of Waldegrave*, 6 Jur. 402, 2 Q. B. 341; 1 G. & D. 615, which overrules *Rex v. Edwards*, 5 B. & Ad. 407. In *Reg. v. Buchanan*, 13 Jur. 423, a society of attorneys in the county of Kent, who had prosecuted a defendant for practising as attorney at the Quarter Sessions without being qualified, were held entitled to costs. [Coleridge, J.—In the argument in that case, it was put upon the ground that the prosecutors were parties grieved, not on the ground that the association of attorneys had any particular duty respecting the matter; and it is fit to say that there was a difference of opinion on the bench in that case.] The guardians were bound to relieve the child as casual poor, being put in the place of the church-wardens and overseers. [They referred to sects. 26 and 38 of stat. 4 & 5 Will. 4, c. 76, amended by stat. 11 & 12 Vict. c. 110, s. 8. [Coleridge, J.—Would the expenses of the prosecution be allowed by the auditor in the accounts of the guardians, if this rule was made absolute? The prosecution was *in pænam* towards the defendant, not in relief of the child. Lord Campbell, C. J.—That would depend upon whether the auditor was bound to allow all expenses incurred by the guardians, those incurred in the discharge of duties of imperfect obligation, as well as those incurred in the discharge of absolute duties.] Secondly, a moral duty was cast upon the guardians to prosecute; they were bound to take care of the child, and stood towards him *in loco parentis*. [Coleridge, J.—The act for which they prosecute must concern them as a public body.]

Whateley and *Murphy*, Serj., contra. The guardians were volunteers in the prosecution; they were not bound over to prosecute. If they are entitled to costs on the second ground relied upon, the constable or justice of the peace, or any other person, would be entitled. In *Reg. v. The Earl of Waldegrave*, 6 Jur. 102, 2 Q. B. 341; 1 G. & D. 615, it concerned the Metropolitan Commissioners of Police to protect their officer, who had been assaulted; and the commissioners are justices of the peace, and have the regulation of the police force. [Erle, J.—Suppose a man is detected in breaking into the union workhouse, and all the property of the union is recovered; there would be no legal obligation upon them to prosecute.] The child was not an inmate of the union workhouse when the assault was committed, nor was he chargeable by law to the union afterwards, because the defendant applied to have him delivered back, and offered to pay all the expenses. [Lord Campbell, C. J.—The guardians must either have maintained the child or delivered him back to his father: would it have been proper, under the circum-

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stances, to have put the child into his hands?] Suppose the child had been carried to a hospital, and the governors of the hospital had prosecuted; would they have been entitled to costs? [Lord Campbell, C. J.—They would not stand *in loco parentis*.] The 59th section of stat. 7 & 8 Vict. c. 101, directs what prosecutions the guardians are bound to institute, and does not mention this. The act for which the prosecution is instituted must concern the prosecutor “as an officer;” that is, he must prosecute *ex officio*. [They referred to *Rex v. Sharpness*, 2 T. R. 47; *Rex v. Edwards*, 5 B. & Ad. 407, note; *Rex v. Dewhurst*, Id. 405; *Rex v. Taunton St. Mary*, 3 Mau. & S. 465; and *Rex v. Cook*, 1 Man. & R. 526.]

LORD CAMPBELL, C. J. I am of opinion that the rule ought to be discharged. The question turns upon the construction to be put on the 3d section of stat. 5 & 6 Will. & M. c. 11, and I will not say that it is to receive either a strict or a liberal construction. I will adopt the canon of construction suggested by my brother Murphy, and look to the words, and gather from them the meaning of the Legislature, to the best of my ability, according to their fair and ordinary sense. The words are, “The Court shall give reasonable costs to the prosecutor, if he be the party grieved, or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them, as officer or officers, to prosecute.” Now, the prosecutors in this case were the guardians of the union; and the question is, whether it concerned them, as such officers, to institute the prosecution. If it does not concern them, unless the law casts upon them the duty of prosecuting, either by virtue of their office or by statute, this case does not come within the enactment, because they would not be indictable if they had omitted to prosecute. But that is not, in my opinion, the just construction of the act. Does it not concern the guardians as such to prosecute, if to prosecute is a duty of imperfect obligation? In *Reg. v. The Earl of Waldegrave*, 6 Jur. 102, 2 Q. B. 341; 1 G. & D. 615, there was no duty of absolute obligation to prosecute, and no indictment would have lain against the Commissioners, if they had neglected to prosecute; but the Court held, and I think properly held, that it concerned them to prosecute. Indeed, it is admitted that the enactment cannot be confined to cases in which there is a legal obligation to prosecute, because the case would come within the section if the flagellation had been inflicted while the child was in the workhouse. Then we are to consider whether, under the circumstances, it was the moral duty of the guardians to prosecute. What was their situation at the time when they instituted the prosecution? They were *in loco parentis* to the child found cast away upon the world within their union, and it was their duty to do all that was necessary to call to account the person who had been guilty of the cruelty which appeared to have been exercised towards him; and when the person was ascertained, it was their duty to prosecute. No pecuniary advantage was to flow to them from the prosecution; but it was for the good of the public that

such an offence should be investigated, and the offender punished. I will further say, that sect. 3 of stat. 5 & 6 Will. & M. c. 11, is, in my opinion, a very salutary enactment, and ought not to be frittered away. If a party charged with an offence insists upon the indictment being brought into this Court, and is convicted, we must take care that he pays the expense to which the prosecutors are thereby put.

COLERIDGE, J. The question is, whether the prosecution was instituted on account of a fact done, which it concerned the guardians, as officers, to prosecute. It was argued for the defendant as if the words were synonymous with the term "prosecution *ex officio*;" and if that could be made out, the correlative to it would be established, that the guardians would be liable to an indictment, or at least to moral censure, if they omitted to prosecute. I agree that the statute is not to be restrained; but, on the other hand, it is not to be construed liberally, if by that it is meant that an interpretation should be given to the words beyond that which they will fairly bear. We ought to give them their full meaning, considering the state of the law at the time of the passing of the statute, and even now, as to the costs of prosecutions; and that this is a wholesome statute. Now, the words "any fact that concerned them, as officers, to prosecute," are of a general nature, and include any thing in which their office gives them an interest, or which has relation to it. Then, were not the guardians placed in a different situation from that of any benevolent person in the street who happened to meet with the child? The circumstance of their being guardians in charge of the union, and bound to take care of the poor within it, varied their situation; and the duty to prosecute would arise out of their bearing that relation to the child brought into their custody. The strongest case cited for the defendant (*Rex v. Sharpness*, 2 T. R. 47) admits of a satisfactory explanation; it was the case of a justice of the peace, who took upon himself to prosecute a jailer who, in his opinion, had neglected his duty; and it was held, that the offence did not concern him, as a justice of the peace, to prosecute, for it is not the duty of a justice of the peace to institute a prosecution, unless a statute directs him to do so; his duty lies rather the other way, for he is either a judge, or he is to stand between the party charged and the Crown. *Reg. v. The Earl of Waldegrave*, 6 Jur. 102, 2 Q. B. 341; 1 G. & D. 615, is directly in point. In that case there was no legal duty to prosecute, and the prosecution would not directly benefit the police constables, but the probable effect of it was to protect them in the discharge of their duties in future.

ERLE, J. We are called upon to decide whether this prosecution, carried on by civil officers, falls within the words of sect. 3 of stat. 5 & 6 Will. & M. c. 11. In construing the statute, we ought to look at the words of the enactment, and the mischief intended to be guarded against. The statute recites, that divers evil-disposed persons, fearing to be deservedly punished where they and their offences

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are well known, have obtained writs of *certiorari* to remove indictments, and the prosecutors, attending with their counsel and witnesses, have been put to great delay and expense; and, for the purpose of remedying these evils inflicted by defendants, enacts, that the defendant who removes an indictment by *certiorari*, shall enter into a recognizance to pay the costs, if he is convicted. I think that we ought to give full effect to the words of the statute, so as to carry out its provision; and I am of opinion that it extends to the case before us. It is clear that it goes beyond the cases in which an officer is bound *ex officio* to prosecute, and would be liable to punishment if he did not prosecute; and if that be so, it must extend to the case in which a public officer, instituting a prosecution, acts with a *bona fide* belief that he is fulfilling a duty of imperfect obligation. The father of a child who had been so maltreated by another person would have been a party grieved within the statute; and in the case of a lost child, without any parents, the guardians of the Union on whom the child is thrown for support, are concerned, as civil officers, to prosecute. There is no way of exactly defining the duty of imperfect obligation, which would bring the case within the statute; but I should be inclined to give the costs, unless I was able to say negatively that the prosecutor had no concern with the matter, and was a mere volunteer. I am therefore of opinion that the defendant in this case is liable to those costs which he has occasioned to the prosecutors, by resorting to the *certiorari*. — *Rule discharged, without costs.*

TAYLOR v. BACKHOUSE.¹

Queen's Bench Bail Court, January 20 and 21, 1851.

An umpire may be appointed by lot, if the parties to the reference assent to such a mode of election.

A RULE *nisi* to set aside an award had been obtained, on the ground of the improper appointment of an umpire. The matter had been referred to two arbitrators, with power to appoint an umpire if they disagreed. Each had proposed an umpire, who was objected to by the other, and they then agreed that the names of their nominees should be written on separate pieces of paper, placed in a hat, and the person whose name was first drawn should be the umpire. This was accordingly done, one of the parties to the reference (Taylor) being present in person, and the other party (Backhouse) being represented by two agents, who attended for the purpose of giving evidence and watching the case on behalf of their principal. The umpire thus chosen made his award, which it was now sought to set aside.

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J. C. Heath showed cause. If there was any irregularity in the appointment of the umpire by lot, it had been waived by the parties consenting to such appointment. The case of *Tunno v. Bird*, 5 B. & Ad. 488, would be relied upon by the other side, who admitted, that if Backhouse himself had been present, he would have waived the irregularity; but that, as he was absent, he had not done so. There was, however, authority for holding the consent of an attorney or agent to be equivalent to the consent of the client or principal. *Re Jamieson*, 4 Ad. & El. 945. In this case the principal was present by his agents. *Re Hodgson*, 7 Dowl. 569, was a case in which the clerks of the attorney assented to the appointment of the umpire by lot; but that was decided on the ground, that *delegatus non potest delegare*, and was therefore distinguishable from the present case. Even if there were any force in the objection, Backhouse could not raise it, inasmuch as he did not show when he first became aware of it. In *Bignall v. Gale*, 5 Jur. 701, 2 Man. & G. 830, an objection to the award, on the ground of irregular and improper conduct on the part of the arbitrators, was held to be waived, as the party had proceeded in the reference after he had knowledge of the defects. When a party to a reference comes to set aside an award, he must be very particular in his affidavit, and ought to show when he first became aware of any irregularity, and that it was after the award was made.

Ogle, in support of the rule. The parties who were present whilst the arbitrators were deliberating upon the appointment of an umpire were merely sub-agents of the defendant, and never informed his attorney of the circumstances. The *onus* of proving that Backhouse was aware of the irregularity lay on the other side. This case was precisely within the terms of *Ex parte Cassell*, 9 B. & Cr. 624. [*Erle, J.* — Backhouse, instead of attending himself, was present by his agents, and they knew of the irregularity, and acted until the termination of the proceedings.] If I appoint an agent to do a thing legally and according to law, and he deviates from that authority, I am not bound by his act. Backhouse had also an attorney, and it did not appear that he assented to the irregularity. The parties present were not agents for the purpose of waiving an irregularity in the mode of conducting the reference.

January 21, 1851. *ERLE, J.*, now delivered judgment. The general principle, as laid down in Russell on Awards, p. 220, is, that the appointment of an umpire must not be dependent on chance, but must be a matter of choice. This case, however, falls within the exception mentioned at p. 221 of the same work, viz., "that the appointment by lot of an umpire will be maintained if the parties, either previously or subsequently, give a clear assent to such a mode of election." Now, this election of the umpire took place in the presence of one of the parties, and the agents appointed by the other to represent him in the course of the reference, and they had full authority either to waive

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such objection, or stand upon it at the time. They thought proper to waive it; and therefore this rule must be discharged, with costs. — *Rule discharged, with costs.*¹

MAN v. BUCKERFIELD.²

Queen's Bench Bail Court, January 20, 1851.

A bailiff of a county Court, who is sued for taking goods under an execution of that Court, is within the exception of the 128th section of the 9 & 10 Vict. c. 95; and the plaintiff in such action, unless he recover more than 20*l.*, or the judge certify, is deprived of costs by sect. 139: and in such case, even though the action were commenced before the 13 & 14 Vict. c. 61, if the master refuse to tax the plaintiff his costs, the Court will not interfere.

Seem, however, the strictly proper course for the defendant to adopt, in actions commenced before the passing of the 13 & 14 Vict. c. 61, is to apply for leave to enter a suggestion to deprive the plaintiff of costs.

THIS was an action of trespass for breaking and entering the plaintiff's dwelling-house, and seizing his goods and chattels. The defendant pleaded, first, not guilty; and, secondly, that before the said time when, &c., and after the passing of the 9 & 10 Vict. c. 95, viz., on the 13th December, 1849, a plaint was levied in the county court, and judgment recovered; that thereupon a writ of *fi. fa.* was issued, and directed to the high bailiff of the said court, (the now defendant,) and that he, by virtue of the said writ, broke and entered the said dwelling-house; and the replication to this second plea admitted the proceedings in the county court, but alleged that the defendant, of his own wrong, and without the residue of the cause mentioned in the plea, committed the trespasses. At the trial, before Pollock, C. B., at the last Assizes for Surrey, a verdict was given for the plaintiff, with 10*l.* damages; and the learned judge did not certify for costs. The Master refused to tax the costs, on the ground that the defendant was an officer of the county court, and within the 139th sect. of the 9 & 10

¹ In *Neale v. Ledger*, 16 East, 51, Lord Ellenborough held an appointment good, where two arbitrators, being unable to agree upon a third, which they were to appoint, had each nominated one person, and then choose by lot one of the two so nominated. But in *Ex parte Cassell*, cited in the case above, the Court overruled that case, and laid down the rule, "that the appointment of the third person must be the act of the will and judgment of the two; must be a matter of choice, not of chance, unless the parties consent to or acquiesce in some other mode." Subsequently, in the case of *Ford v. Jones*, 3

Barn. & Ad. 248, the Court disregarded the exception in this rule, and held an appointment made by chance invalid, although made by the consent of the parties. But the Court afterwards affirmed the rule and the exception, and both now seem to be equally well established. *Tunno and Bird*, in re, 5 Barn. & Ad. 488. *James v. Atwood*, 7 Scott, 841. But an acquiescence in such appointment will not bind a party, unless made with a full knowledge of all the facts. *Wells v. Cook*, 2 Barn. & Ald. 218. *Jamieson and Binns*, in re, 4 Ad. & Ellis, 945. *Greenwood and Jonathan*, in re, 9 Ad. & Ellis, 699.

Vict. c. 95.¹ A rule had been obtained by Pearson, calling upon the defendant to show cause why the Master should not proceed with the taxation of costs, and allow them to the plaintiff in the action.

M. Chambers now showed cause. The application was made for the purpose of obtaining a judicial interpretation of certain clauses in the County Court Act. There was nothing in the affidavits to enable the Court to say it had any power to correct the course adopted by the Master in refusing to tax the costs. The objection urged to the taxation of the costs was, that the learned judge who tried the cause had not certified for costs on the back of the record. It was admitted that the defendant was acting, at the time he executed the writ, as high bailiff of the county court: he was, therefore, within the expressions of the 139th section, acting "under color or pretence of the process of the Court." The other side relied on the 128th and 129th sections. But, looking even at the 128th section, the action was brought within the exception, as being "in respect of a claim to goods and chattels taken in execution of the process of the Court." The question was, whether the clauses were or were not consistent. If they were inconsistent, then, on the principle that a subsequent act of Parliament always overrides a prior one, the latter clause in this case must prevail. It was not necessary to move to enter a suggestion on the record to deprive the plaintiff of costs, because the Master had no power to proceed with the taxation.

Pearson, in support of the rule. The exception in the 128th sec-

¹ The following are the sections in the 9 & 10 Vict. c. 95, referred to in this case:—

Sect. 118, which is sufficiently set out in the argument.

Sect. 128. "All actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county Court shall be a party, (except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof,) may be brought and determined in any such superior Court, at the election of the party suing or proceeding, as if this act had not been passed."

Sect. 129. "If any action shall be commenced after the passing of this act, in any of her Majesty's superior Courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in any Court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.* if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

Sect. 139. "If any person shall bring any suit in any of her Majesty's superior Courts of record in respect of any grievance committed by any clerk, bailiff, or officer of any Court holden under this act, under color or pretence of the process of the said Court, and the jury, upon the trial of the action, shall not find greater damages for the plaintiff than the sum of 20*l.*, no costs shall be awarded to the plaintiff in such action, unless the judge shall certify in Court, upon the back of the record, that the action was fit to be brought in such superior Court."

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tion was applicable to the 118th section, which says, "If any claim is made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord for rent, or any person not being the party against whom the process issued," then the County Court shall have the power of determining the question by interpleader. If the question rested only on the 139th section, then the plaintiff would not be entitled to costs; but there is the 128th, which appears to be altogether inconsistent with the 139th. The Legislature had felt that a person was not likely to get justice in the County Court, where the other party was an officer of the Court, but that the judge would lean to the act of his own officer, and therefore the 128th section was enacted. The 129th section was not applicable to this case. In *Meeten v. Nicholls*, 12 Jur. 420, it was held, that the defendant, in order to obtain a suggestion to deprive a plaintiff of costs, must negative the fact of the party being an officer of the court. It was not shown that the defendant was the high bailiff of the court. [*Erle, J.* — I thought it was alleged on the record that he was; the replication admits that the *fi. fa.* was delivered to the defendant as high bailiff of the County Court.] If he was, it would be a very easy thing for them to produce an affidavit stating that fact. The jury have negatived that the act of the defendant was committed "under color or pretence of the process of the Court," by finding the second plea against him. He lastly contended, that the fact of whether the defendant was high bailiff of the County Court ought to be tried by a jury, and the only proper mode would have been by moving to enter a suggestion on the record. *Bower v. Cooke*, 4 Dowl. & L. 816. [*Erle, J.* — Have not the proceedings with regard to entering suggestions under the 9 & 10 Vict. been altered?]¹ The Extension Act, 13 & 14 Vict. c. 61, applies only to actions which are brought since the passing of the statute. This action was commenced before that period.

ERLE, J. With respect to the entry of a suggestion, that may be a matter for future consideration. The point before me is, whether the Master was mistaken in his construction of the 139th section of the 9 & 10 Vict. c. 95. The defendant was high bailiff of the County Court; a writ of *fi. fa.* was delivered to him; he entered into the house and took the goods and chattels of the plaintiff. The truth of these facts being assumed, the plaintiff says, that though the defendant is within the terms of the 139th section of the statute, yet he, the plaintiff, comes within the protection of the 128th and 129th sections. The fact of the jury having found that the writ did not protect him, does not take him out of the purview of the 139th section, which was enacted for the protection of officers intending to execute a writ, but guilty of some indiscretion. If they act under color and pretence of the process of the Court, *bona fide* intending

¹ It is not necessary to enter a suggestion to deprive a plaintiff of costs. (13 & 14 Vict. c. 61, s. 11.)

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to do their duty, but mistaking that duty, they are protected. Then, unless the jury give more than 20*l.* damages, the plaintiff is not entitled to costs. I do not find any inconsistency in the other sections. By the 118th section, where an officer has seized goods under the process of the Court, and a claim is made to them by a third party, such officer may apply for and obtain a process in the nature of an interpleader summons. The statute gives him the option of adopting that course, but does not make it compulsory, and does not prohibit an action if he do not make the application under the section. The 128th section gives concurrent jurisdiction to the superior Courts if an officer of a Court is a defendant, as the judge, in such a case, might be suspected of partiality; and therefore the plaintiff may sue in the superior Court. Then comes the exception, "except in respect of any claim to any goods and chattels taken in execution of the process of the Court, or the proceeds or value thereof," which takes away the plaintiff's right to costs in such a case, if he sue in the superior Courts; and the present is clearly an action founded on goods and chattels taken in execution, or the proceeds or value thereof. The 129th section says, that in all those cases in which the concurrent jurisdiction is given by the 128th section, the plaintiff may have his costs. The 139th section stands quite clear of these, and I think the Master was right in his view of the law. But there are some minor points. It does not actually appear, by affidavit, that the defendant was the high bailiff of the County Court. I think, however, this was not disputed before the Master. The jury did not negative the defendant's being the high bailiff, for, as they negatived one material fact, the entire plea would be found against the defendant; and it is perfectly consistent with the verdict that the other facts did exist. As to the last point, that the defendant ought to proceed by way of suggestion, I think that would have been the proper course; but this objection was not taken before the Master, and it is consequently not before me. I think that the Master was right, and the rule must be discharged. — *Rule discharged.*

Thompson & another, Executors, v. Whatley.

THOMPSON & another, Executors, v. WHATLEY.¹

December 6, 1850.

*Insolvent—Final Protection—Sums payable at a future Time—
Liability of Surety for Grantor of Annuity—7 & 8 Vict. c. 96, s. 25.*

A surety for the grantor of an annuity who has become insolvent, and has obtained a final order for protection under the 5 & 6 Vict. c. 116, s. 10, is not protected from being sued on the default of the grantor for instalments accruing due subsequently to the filing of the petition, by 7 & 8 Vict. c. 96, s. 25, his liability to pay not being a debt within the meaning of that section.

COVENANT upon a deed granting a life annuity payable quarterly, granted by one G. B. to the plaintiffs' testator by deed, dated the 14th of November, 1837, by which the defendant covenanted, that if default should be made by B., the grantor of the annuity, in the performance of his covenant to pay, he, the defendant, would from time to time, after such default, pay such annuity. The defendant pleaded, that, after the accruing of the causes of action, he obtained a final order for protection under the stats. 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102; and that the said deed was made, and that the said debts and causes of action in the declaration mentioned accrued and were contracted, before the date of the filing of the defendant's petition to the court. The plaintiffs replied, that such debts and causes of action accrued not before, but after the date of the filing of such petition, and thereupon issue was joined. The parties, in pursuance of leave given by an order of Lord Denman, dated the 24th of December, 1849, agreed to abide by the opinion of the court upon the following case:—

The annuity deed, petition, extract from schedule, final order and pleadings were to be taken as part of this case. The date of the filing of the petition set out in the plea is the 31st of January, 1849, and that of the final order is the 20th of April, 1849. The grantor of the annuity, G. B., is still living, and he made default in payment of the annuity for the quarters ending the 14th of May and the 14th of August, 1849; whereupon the present action was brought to recover those arrears.

The question for the opinion of the court was, whether the defendant was discharged from his covenant by the above petition and order. If he was not, judgment was to be entered for the plaintiffs by confession for 11l. If he was, a *nolle prosequi* was to be entered.

Barstow, for the plaintiffs.² The question is, whether the defendant is discharged from this covenant, which he entered into as a surety, by the final order for protection obtained under the 5 & 6 Vict. c. 116, the grantor having made default after the filing of the petition. The

¹ 20 Law J. Rep. (N. S.) Q. B. 86.

² November 15, before LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

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defendant relies on the 7 & 8 Vict. c. 96, s. 25, which provides, that "every sum of money which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, &c., shall be deemed and taken to be debts" within the meaning of the recited act, and from actions in respect of which the insolvent is to be protected by the 5 & 6 Vict. c. 116, s. 10. But it is plain that the sole object there was to provide for the insolvency of the grantor, not of the surety. By sect. 73, this act is to be construed in analogy to the law of bankruptcy, and under the 6 Geo. 4, c. 16, s. 54, the instalments of an annuity, for the payment of which a bankrupt is surety only, and which he covenants to pay in case of default by the grantor, are not, where they became due after the bankruptcy, provable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 168; s. c. 4 Law J. Rep. (N. S.) C. P. 311. There are here no data for calculating the value of the liability of the insolvent, as it depends upon circumstances incapable of being estimated, and therefore it would not be provable even as a debt payable upon a contingency if those words had been inserted in the act now in question. *In re Foster*, 19 Law J. Rep. (N. S.) C. P. 274. The surety, after he had paid, would have a remedy over and against the grantor, his principal. *Ex parte Marks*, 3 Mont. & Ayr. 521; 2 Jur. 348. *Hocken v. Brown*, 4 Bing. N. C. 400; s. c. 7 Law J. Rep. (N. S.) C. P. 197. *Abbott v. Bruerre*, 5 Ibid. 598; s. c. 9 Law J. Rep. (N. S.) C. P. 81.

Macnamara, contra. The 7 & 8 Vict. c. 96, s. 25, applies to this case. This is, no doubt, not strictly speaking, a debt due at the time of filing the petition, but the relation of debtor and creditor between the grantee and the insolvent is constituted by the statute; for money is payable, that is, liable to be paid by the latter at a future time; it contemplates a debt in its popular, not its legal sense. The words of the 6 Geo. 4, c. 16, s. 56, "payable on a contingency," cannot apply to debts strictly so called; for while there is a contingency there can be no debt in its legal sense. But that section includes money due from a bankrupt on a guaranty, although the principal debtor does not make default until after the fiat. *Ex parte Myers*, 1 Mont. & B. 229. *In re Willis*, 4 Exch. Rep. 530; s. c. 19 Law R. Rep. (N. S.) Exch. 30. *Ex parte Lewis*, 1 Mont. & M'Ar. 426; s. c. 8 Law J. Rep. Chanc. 56. *Ex parte Grundy*, Ibid. 293; s. c. 8 Law J. Rep. Chanc. 54. Therefore, the fact of the insolvent being a surety does not prevent the act from applying, and the suretyship arising out of an annuity deed will constitute a debt as much as a guaranty. If so, it is immaterial whether the liability of the insolvent be primary or collateral. It is objected that the contingency of the grantor making default is not calculable; but the calculation of the value of the debt is to be made merely with reference to the price originally paid for the annuity, with a proper deduction for the lapse of time since it has been granted. The probability of the surety becoming liable can be no element in the calculation.

[*Lord Campbell*, C. J. Then, you say that the same value is to be set on the annuity against the grantor and against the surety?]

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Yes; the same course must be taken as in bottomry and respondentia bonds, or life assurances under the 16 Geo. 4, c. 16, s. 53. The claim should be entered and the dividend reserved. *Goddard v. Vanderheyden*, 3 Wils. 262, and *Cox v. Liotard*, 1 Dougl. 166, n. *Thompson v. Thompson* turned upon a different statute. This act does not limit the debts to those due from the party obtaining the final order, and it should be construed liberally, so as to include persons who are substantially debtors.

Barstow, in reply. *Ex parte Myers* and the cases of gauranty were referred to and distinguished in *Thompson v. Thompson*. Then, the absence of any clause relating to sureties in the 7 & 8 Vict. c. 98, shows that they were not meant to be included. But, at all events, this is not a debt, but a mere contingent liability to pay something which may from time to time accrue due. The annuity itself cannot be that which is to be valued, for it is still to go on against the grantor.

Our. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. In this case the defendant, being surety for the grantor of an annuity, and having obtained a final order for protection, claims to be protected from liability for instalments of the annuity accruing due, subsequent to the time of filing his petition, which the grantor has failed to pay. The defence was founded on the 7 & 8 Vict. c. 96, s. 25, whereby sums of money payable by way of annuity or otherwise, at a future time, are made debts within the statute. But it is clear that the instalments in question were not, at the time of filing the petition, payable by the insolvent at any future time. His liability did not depend upon the lapse of time merely, but on the contingency of the grantor making default, which might not happen at all. The cases relating to debts payable upon a contingency are founded on statutes in which that description of debt is specified, and have no application to the statute now under consideration, from which that description of debt is omitted. The judgment in *Thompson v. Thompson* gives the reasons why the construction contended for by the defendant would be impracticable with reference to the rights of other creditors; and it governs the present case.

Judgment for the plaintiffs.

In re Bell v. The Port of London Assurance Company.

***In re BELL v. THE PORT OF LONDON ASSURANCE COMPANY.*¹**

Queen's Bench Bail Court, November 9 and 21, 1850.

Affidavit — Jurat — Date — Allegation of Commissioner's Authority — Costs — Pauper Plaintiff.

Where the jurat of an affidavit stated, that it "was sworn by A B, at G., in the county of L., in Scotland, the fifth of June, eighteen hundred and fifty years, before me, G. R. T., a commissioner for Scotland, for taking affidavits in the court of queen's bench at Westminster," it was held, that the date of swearing the affidavit, and the authority of the commissioners to take affidavits for the court of queen's bench, were sufficiently set forth.

A plaintiff, who applies to the court to compel his attorney to repay him the amount of the costs of the day which he had been forced to pay, as he alleged, by reason of the misconduct of the attorney, is not privileged by reason of his suing *in forma pauperis*, from having to pay the costs of the motion, if the rule is discharged.

THIS was a motion, on the part of Archibald Bell, the plaintiff, calling upon his attorney in the action (in which the plaintiff sued *in forma pauperis*) to repay to him the amount of the costs of the day, which the plaintiff had been obliged to pay in consequence, as he alleged, of the misconduct of the attorney. The rule was not moved with costs. The application was founded on the plaintiff's affidavit; the jurat of which was in the following words:—

"Sworn by the deponent, Archibald Bell, at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, eighteen hundred and fifty years."

"Before me, G. R. Tennent, a commissioner for Scotland for taking affidavits in the court of queen's bench at Westminster."

Hawkins showed case. There are two preliminary objections. First, the jurat of the affidavit, on which the motion is founded, is insufficient. It is an established rule that the time when the affidavit is sworn must appear in the jurat. Here it is not stated in what year it was sworn. The expression "eighteen hundred and fifty years" has no definite meaning. There is nothing to show from what event the time is to be computed. It is not in the ordinary form of a jurat, in which the time is presumed to count from the year of our Lord. It may mean that the affidavit was sworn eighteen hundred and fifty years ago. In *Re Lloyd*, 1 L. M. & P. 545; s. c. 19 Law J. Rep. (n. s.) Q. B. 457, where the jurat was "sworn by A B and C D, the above-named deponents, at my chambers, Rolls Garden, Chancery Lane, dated this 24th of April, 1850," the court held it insufficient. So the omission of the day of the month was pronounced a fatal defect in *The Duke of Brunswick v. Harmer*, 1 L. M. & P. 405; s. c. 19 Law J. Rep. (n. s.) Q. B. 456.

[*Patteson*, J. The question is, whether there can really be any doubt that it means in the year of our Lord. If the word "years" had been omitted, the jurat would clearly have been sufficient. The case of *Re Lloyd* is far from being in point. There the insertion of

¹ 20 Law J. Rep. (n. s.) Q. B. 89.

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the word "dated" created an ambiguity as to when the affidavit was sworn. There is no real ambiguity here., I do not think that objection can prevail.]

There is a second objection to the jurat. It does not purport that the affidavit was sworn before a duly authorized commissioner. There is nothing to show that the person alleging himself to be "a commissioner for Scotland" was a commissioner appointed by the court of queen's bench under the 3 & 4 Will. 4. c. 42. He may have been appointed by some court in Scotland. The usual form is not followed. It does not say that he is a commissioner of the court of queen's bench.

Birnie, in support of the rule, (November 9.) The jurat sufficiently states the authority of the commissioner. It is more explicit than the usual recognized form, which is "a commissioner, &c." It is not possible to misunderstand this. A commissioner for taking affidavits is never appointed for the whole of England, but for a few counties only, and yet it is always presumed that he has authority to take affidavits in the county in which he acts until the contrary be shown. It will, therefore, if necessary, be presumed that he had authority here.

Hawkins, in reply. Though the expression "sworn before me, a commissioner, &c.," has been held sufficient, yet when the "&c." has been left out, it has been held insufficient. *Hill v. Royston*, 7 Jan. 1830. If an issue be made up in an action without adding the *similiter*, it is clearly defective, yet if an "&c." be added after the words "and of this the defendant puts himself upon the country," the courts have after verdict treated the "&c." as equivalent to a *similiter*. There is no "&c." here on which any construction can be put.

[*Patteson*, J. I do not find that any particular form of jurat is required by the statute. If the expression had been "a commissioner in Scotland for taking affidavits in the court of queen's bench at Westminster," I should have had no doubt of its sufficiency. I can hardly read the words "a commissioner for Scotland for taking affidavits in the court of queen's bench" as importing that he was appointed by any Scotch authority. I think the fair meaning of the words is, that he was a commissioner appointed by the court of queen's bench at Westminster for taking affidavits in Scotland. This objection, therefore, must be overruled.]

The facts of the case were then gone into, and the rule was discharged on the merits, with costs.

Birnie, on a subsequent day, (November 17,) made application, on the part of the plaintiff, to have the rule discharged without costs, on the ground that a pauper plaintiff was not liable to pay costs, and he cited *Pratt v. Dularue*, 10 Mee. & W. 509; s. c. 12 Law J. Rep. (N. S.) Exch. 25.

[*Patteson*, J. That case is a decision that a pauper plaintiff is not liable to pay interlocutory costs. It is surely a very different thing when the motion is not made in the cause. When a pauper

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makes an application against his own attorney, it is not a step in the cause.]

Cur. adv. vult.

PATTERSON, J., now gave judgment. I have considered the application to have this rule discharged without costs. The ground of the application was, that by reason of the misconduct of his attorney, the plaintiff had been made liable to pay the costs of the day. Now, as a pauper plaintiff is liable by the rule of court to pay the costs of the day, the foundation of this motion is a matter in respect of which the plaintiff is not exempted from costs as a pauper. I, therefore, am of opinion that this is not a case in which the plaintiff is entitled to have his privilege as a pauper. The privilege of the plaintiff being then put out of question, I think that I must give the costs of the motion to the attorney, who has made a full answer on the facts.

Rule discharged, with costs.

BULLOCK v. JENKINS, sued as HENRY BENTINCK.¹

Queen's Bench Bail Court, November 14, 1850.

Arrest — Judge's Order to hold Defendant to Bail — Affidavit — Averment of Damage above 20l. — Of issue of Writ of Summons — Rescinding Order — Applying for Defendant's Discharge — Using Affidavits of collateral Facts — Defendant no Intention of leaving the Country.

On a motion to rescind a judge's order to hold a defendant to bail in an action, the court will not receive affidavits of collateral facts not submitted to the notice of the judge.

It is not absolutely necessary that the plaintiff's affidavit, in support of the application to the judge to hold the defendant to bail in an action for criminal conversation, should have averred that the plaintiff had sustained damages to the amount of 20l., if the court, on the motion to rescind the order, can see that the judge was justified in holding that the affidavit showed sufficiently that the plaintiff had sustained damage to that amount.

The affidavit need not state that the writ of summons has been sued out. It is enough if the judge, at the time of the application for the order, was satisfied that it had issued.

It is competent for the defendant to apply to the court to be discharged out of custody, although he has already applied for that purpose, but in vain, to the same judge who made the order warranting his arrest. On such a motion to the court, the defendant may use additional affidavits to those used before the judge, and may show as grounds of discharge that the plaintiff has no cause of action, and also that he, the defendant, has no intention of leaving the country.

THIS was an application on the part of the defendant to rescind an order of Platt, B., to hold the defendant to bail, and also to discharge the defendant out of custody.

The order had been obtained, on the 28th of October, on the following affidavit of the plaintiff : —

¹ 20 Law J. Rep. (N. S.) Q. B. 90.

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"Richard Bullock," &c., "saith that he, deponent, has a legitimate and proper cause of action against the above-named defendant; Henry Bentinck, for criminal conversation with the wife of deponent. That he, deponent, is the husband of Mary Bullock, formerly Mary Jewell, of Rotherham, in the county of York. That the said Mary Bullock, deponent's said wife, has for more than two years past been stolen away from the protection of deponent and from his young children. That deponent has sought her many thousand miles around the kingdom, and has expended in the search of her from 500*l.* to 600*l.*; that deponent has only recently discovered that she has for more than two years past been under the protection of and in adultery with the above-named defendant, and that she is still living in adultery with the said Henry Bentinck. That on or about the 18th of September last, having heard that 'Bentinck' was not the real name of the said defendant, he, deponent, wrote a note to him, requesting his name and addition, &c., and afterwards called at a tavern in the neighborhood of the said defendant's residence, and while there the waiter informed deponent that a gentleman wished to speak with deponent at the door; that deponent went out to the door and there saw the said defendant, who, standing with a lighted cigar in his hand, said to deponent, 'What the devil is it you want, sir?' The deponent replied, 'that he wanted a little gentlemanly conduct and common courtesy; and that as he, the said defendant, already knew deponent's name, and who he was, he, deponent, would thank the said defendant for his name and addition, which, in point of honor, deponent said he was bound to give him.' The said defendant replied, 'that he would see the deponent damned first; and if deponent pelted him with any of his law, or commenced any action against him, he would immediately leave the kingdom and take deponent's wife with him; that he had lived many years abroad, and would go and live there again.' That his children have several times informed deponent that the said defendant has several times threatened them, and said to them, 'that if deponent then further commenced any action at law, or took any proceedings against him, he, the defendant, would immediately go away and leave the kingdom, and take their mother (deponent's said wife) beyond the seas and abroad, and live there; and that neither they nor the deponent should ever see her again; that he had lived many years abroad, and would go and live there again.' Believes that, unless he be restricted or forthwith apprehended, he will immediately quit and leave the kingdom, and take with him said deponent's wife and the mother of his children. That the said Mary Bullock, deponent's said wife, is a lady of a highly respectable family, and of considerable personal appearance and accomplishments, and the daughter of a gentleman of considerable property and respectability in Yorkshire. That deponent has sustained great damage and injury, not alone in the loss of the comfort, solace, and society of his said wife, and his young children in the loss of the maternal, parental, and personal duties and comfort and protection of their mother for the last two years past, (the performance of all which personal duties have for

more than the last two years past been imposed on deponent,) but also in the great expense which deponent has incurred and been necessarily put to, with his three young children, in search of her during the last two years past, and being kept out of and taken away from all professional and other duties and business during that period, and to the manifest great damage and injury of deponent, his prospects and professional business, and his prospects forever hereafter through life. That the said Henry Bentinck is a private gentleman, apparently out of all business, and living on his own resources, and resides in Milton Street, Dorset Square."

The defendant having been arrested under a writ of *capias*, issued on the above-mentioned order of Platt, B., of the 28th of October, afterwards applied to the same learned judge to rescind his order, on affidavits, alleging that he had no intention of leaving the country; but his lordship dismissed the application, and merely ordered the amount of bail to be reduced. On the present application to the court, various additional affidavits were used by the defendant, for the purpose of convincing the court that he had no intention of going abroad. The defendant also swore that he had a good defence to the action.

The plaintiff, in answer, produced affidavits contradicting the defendant's allegations in many material particulars.

[On the motion for the rule *nisi*, among other objections to the affidavit on which the order was founded, it was urged that the affidavit did not show that any writ of summons had been sued out in the action.

Patteson, J. refused the rule as to that objection, observing that the judges did not consider an affidavit of that fact necessary; and though it was requisite that a writ of summons should be sued out before applying to a judge for the order to hold a defendant to bail, it was quite sufficient if the summons were shown to the judge at the time of the application.]

Wilkins, Serj., and *Lush* showed cause, (November 6.) The defendant having applied to Platt, B., for his discharge, is not entitled to come before this court, by way of appeal from his decision. At any rate, this court cannot receive any other affidavit than that which was used before Platt, B., who made the order, either for the purpose of rescinding the order, or for discharging the defendant out of custody. The only jurisdiction which this court has is derived from sect. 6 of the statute 1 & 2 Vict. c. 110. The affidavit on which the order was made is quite sufficient in every particular. It is not necessary that the plaintiff should swear that he has sustained damage to the amount of 20*l*. It is sufficient if the affidavit shows to the satisfaction of the judge that the plaintiff has sustained damage to that amount. An allegation by the plaintiff, that he had sustained damage to the amount of 1000*l*., would not have influenced the mind of the judge, who had to decide upon the sufficiency of the affidavit. The plaintiff has sworn to certain facts, from which the judge may

see that the plaintiff has received an injury and damage, not, indeed, to be exactly computed in money, but far exceeding 20*l*. The statute does not require, either in terms or by implication, that the plaintiff should pledge his oath to the amount of damage sustained. In the form of an affidavit to hold to bail in an action of trespass for an assault, in Tidd's Pract. p. 105, 4th edit., the amount of the damages is not stated. It is true, that in a later edition of the same work, 8th edit. p. 76, an allegation as to the amount of damage is inserted; but there is no authority for the allegation. In *Hadderweek v. Catmur*, Barnes, 61, it is not stated that any amount of damages was alleged in the affidavit. On the conflicting allegations in the affidavits, it is submitted, that the court will come to the conclusion, that if the defendant had not been arrested, he would have gone abroad.

Bovill and *Garth*, in support of the rule. With regard to that part of the application that seeks to rescind the order of Platt, B., it is conceded that only the affidavit which was used before Platt, B., can be looked to. But new and additional affidavits may be used for the purpose of inducing the court to discharge the defendant out of custody. The defendant is not precluded from questioning the decision of Platt, B. Archb. Pract. 698, 8th edit. *Gibbons v. Spalding*, 11 Mee. & W. 173; s. c. 12 Law J. Rep. (n. s.) Exch. 185. *Pegler v. Hislop*, 1 Exch. Rep. 437; s. c. 17 Law J. Rep. (n. s.) Exch. 53. *Thomas v. Evans*, 9 Mee. & W. 829; s. c. 12 Law J. Rep. (n. s.) Exch. 41. It is submitted, that the order must be rescinded, because the original affidavit of the plaintiff on which it is founded is insufficient. *Hopkins v. Salembier*, 5 Ibid. 423; s. c. 8 Law J. Rep. (n. s.) Exch. 255. The main objection to it is, that it does not state that the plaintiff has sustained damage to the amount of 20*l*. There ought to be a certain precise statement to that effect, or there is nothing to guide the judge in the exercise of his discretion in fixing the amount in which the bail are to be bound. Positive averments are as necessary in an affidavit to hold to bail as in a declaration, and as much certainty is requisite. *Balmano v. May*, 6 Dowl. P. C. 306. *Hodgson v. Dowell*, Ibid. 344; s. c. 7 Law J. Rep. (n. s.) Exch. 96; *Lush's Pract.* 592. The affidavit is also defective, because it does not positively aver that Mrs. Bullock was the plaintiff's wife when she was taken away. It does not even state clearly that she was living in adultery with the defendant, but merely that the plaintiff had discovered that she was so living. With regard to the second part of the application, the case of the plaintiff is completely answered. He does not even now venture to allege that he has a cause of action to the amount of 20*l*. The defendant has, it is apprehended, shown the court satisfactorily that he has had no intention of leaving the country.

Our. adv. vult.

Judgment was now delivered by

PATTESON, J. This was a rule calling upon the plaintiff to show

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cause why an order of Platt, B., to hold the defendant to bail should not be rescinded, or why the defendant should not be discharged out of custody. The application is divided into two parts. The granting or refusing the first part must depend upon whether the order was rightly made in the first instance, and that again will depend upon whether the affidavit on which it was founded was sufficient to justify the learned judge in making the order. I take it to be quite clear that, on a motion to set aside an order of a judge warranting the arrest of a party, it is not competent for the party making the application to produce affidavits as to collateral facts not submitted to the notice of the judge. I do not say that no affidavit can possibly in any case be produced before the court which was not before the judge, for I can conceive some circumstances having taken place before the judge which may have been disputed, and which may bear upon the case, although as the obtaining such an order is an *ex parte* proceeding, it is not probable that any such affidavit could be made. Therefore, though I will not go the length of saying that in no possible case an affidavit could be received, I am yet quite clear that, on a motion to set aside the order, no affidavit can be received as to any collateral facts such as to show that there was no cause of action, or that the defendant had no intention of leaving the country, though proof of these facts may well be received on a motion to discharge the defendant out of custody. In considering, then, whether the order of Platt, B., ought to be set aside, I must confine myself to looking at the affidavit on which the order was made. On the motion for the rule *nisi*, an objection was taken that it did not appear in that affidavit that any writ of summons had been sued out, without which the judge could not have been justified in making the order; but I then held, that it was not necessary that the affidavit should state that fact, as the judge would not have made the order unless he had been satisfied that the writ had issued, and I refused to grant the rule on that ground. The principal objection made to this affidavit was, that the deponent did not state that he had sustained damages to any specified amount, but merely that he had received damage. Previous to the recent statute, in an action such as this, a party could not have been arrested without a judge's order, as this was a claim for unliquidated damages. Very few cases are to be found in which such an order has been granted in actions for unliquidated damages, except where the defendant was about to leave the country. In the 4th ed. of Tidd's Prac. p. 105, the form of an affidavit to hold to bail in an action of trespass for an assault does not state the amount of damages. In a later edition I find the amount is added, whether *pro majore cautela*, or because the learned author of that work thought it necessary, I know not. There can, however, be no doubt, that in affidavits of this sort it would be better that some sum should be mentioned. Had the point been called to the attention of Platt, B., he probably would have told the applicant to amend the affidavit in this respect, before he granted the order. I have considered the matter a good deal, and looked at the affidavit. The act of Parliament says, that the judge is to be satisfied that the cause of action is above 20*l.*, but it does not

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say that it must be sworn in the affidavit that it exceeds that amount. I think that the omission of any allegation as to a specified amount of damage does not, in this case, justify me in holding that the affidavit is insufficient. The affidavit states that the plaintiff had lost his wife for two years; had expended from 500*l.* to 600*l.* in search of her, and had recently discovered that she was living in adultery with the defendant. — [His lordship here read the affidavit.] — The question is, whether this affidavit sufficiently shows to the learned judge, or whether he could gather from it, that the plaintiff had received damages to the amount of 20*l.* It is not sworn that the plaintiff had any reason to believe that the defendant had taken his wife away. If it had been so sworn, perhaps the 500*l.* or 600*l.* which he expended in search of her might have been recoverable as special damages. But I think, upon the whole, that I cannot say that the learned judge was wrong in coming to the conclusion that the affidavit showed that the plaintiff had sustained damage above 20*l.*: consequently, the learned judge was at liberty on this affidavit to make the order, directing the defendant should be held to bail. Other objections were taken that the affidavit did not state that Mrs. Bullock was the plaintiff's wife when she was taken from him two years ago, or positively affirm that she was living in adultery with the defendant, as it only alleged that the plaintiff had discovered that she was living in adultery with him; but I think the affidavit quite sufficient in these respects. The first part of this rule must, therefore, be discharged.

Then, as to the second part of the application, which is for the discharge of the defendant out of custody, it appears that an application to discharge the defendant had been made to the learned judge, but that the latter had refused it. It is competent, nevertheless, for the defendant to come to this court and ask for his discharge. The application is not by way of appeal from the decision of the learned judge, but is a substantive application, and therefore new facts may be introduced. Several cases are to this effect. Indeed, in the late case, *Pegler v. Hislop*, in the exchequer, it was held, that it was competent for the defendant to show that there was no cause of action, but that he meant to do that quite to the satisfaction of the court. It is clearly competent for the defendant to show that he had no intention of leaving the country. Both of these things the defendant attempts to do. — [His lordship here referred to the affidavits.] — It seems to me, from these affidavits, that the defendant has not brought himself within the rule, laid down by the court of exchequer, of satisfying the court that the plaintiff had no cause of action, neither has he convinced me that he had no intention of going abroad. The rule, therefore, must be discharged altogether, and with costs.

Rule discharged accordingly.

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NODEN v. JOHNSON & another.¹

December 7, 1850.

Trespass — Plea of Justification — Material Averment — Matter of Description — Distinct Trespases.

Trespass, for that the defendant "assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded, and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows." **Plea**, "as to the assaulting, beating, and ill treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made a great noise, disturbance, and affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, as such captain, to preserve peace and order, and prevent the beating and wounding of such person, gently laid his hands upon the plaintiff, which was the trespass complained of:—

Held, first, that the plea would have been good, without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel, whose name was unknown to the defendant. *Secondly*, that such statement did not necessarily contain matter of description, and, consequently, that a failure of proof of that part of the plea was not material. *Thirdly*, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea.

TRESPASS. The declaration in substance alleged that the defendants "assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded, and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows."

The defendant Johnson, by his third plea, as to "the assaulting, beating, and ill treating" the plaintiff, justified as captain of a vessel having the plaintiff and other persons as passengers on board, alleging that the plaintiff made a great noise, disturbance, and affray on board the said vessel, and was then fighting with a certain other person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person, wherefore the defendant Johnson, for the preservation of the peace, and to preserve due order and discipline in the vessel, and to separate and part the plaintiff and the other person so fighting together, and to prevent the plaintiff from beating, wounding, and ill treating the said other person as he would have done, then, as such captain, gently laid his hands upon him, which was the trespass mentioned in the declaration. The other pleas were, not guilty, and *son assault demesne*.

At the trial, before Parke, B., at the last Lincoln spring assizes, the jury expressly found that the plea of justification by the defendant Johnson was fully proved, with the exception of that part which alleged that the plaintiff was at the time fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," the fact as shown by the evidence and further found, being, that the plaintiff was at the time

¹ 20 Law J. Rep. (n. s.) Q. B. 95.

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attempting to assault a person named Shore, the mate of the vessel, who was the other defendant in the action, and well known to the defendant Johnson. Thereupon, under the direction of the learned judge, who thought that the part of the plea not proved was material, a verdict was entered for the plaintiff, with 7*l.* damages; leave being reserved to the defendant Johnson to move to set that verdict aside, and to reduce the damages to 5*s.*, that being the amount found by the jury in respect of the alleged knocking down and prostrating of the plaintiff on the deck of the vessel, which was proved, and which the learned judge ruled was alleged as a distinct trespass not covered by the plea. There was no evidence of any joint trespass having been committed, and a verdict was found for the other defendant, Shore.

In Easter term last a rule *nisi*, pursuant to the leave reserved, and also for a new trial, on the ground of misdirection as to the trespass in respect to which the 5*s.* damages had been assessed, was obtained, against which

Hayes (November 28) showed cause. The allegation in the plea, that the plaintiff was fighting with another person, then being "a passenger in and on board of the said vessel, and whose name was to the defendant unknown," is a material part of the plea; and the whole not having been proved as alleged, the justification is not made out. This falls within the well-established rule as to certainty in pleading. The particulars of the alleged affray were necessary to be stated in the plea. Terror caused to persons may constitute an "affray;" but then it must be by others fighting. Then, words will not be enough. 1 Russ. on Cr. 271; 1 Hawk. P. C. 63. The plea, therefore, could not have rested merely on the allegation of an affray, any more than it would be sufficient to plead simply a burglary, and justify because of it. The necessary circumstances must be stated in the plea — *Mure v. Kaye*, 4 Taunt. 34, and proved as laid — Stephen on Pleading, 378. *The King v. Walker*, 3 Camp. 264. The plaintiff here never could have supposed that the defendant intended to set up under the plea, that he had assaulted the mate of the vessel, whose name was not unknown, nor was he, properly speaking, a passenger on board the vessel. Then, as to the point of misdirection. The third plea is a plea of *molliter manus imposuit* simply, and more cannot be justified under that than a legal battery, not violence. Here, it is pleaded to a part only of the trespasses. The knocking down on the deck is not covered by it, and therefore the plaintiff is entitled to retain the verdict for the 5*s.* found as to that. By pleading in this form the plaintiff was prevented from replying the excess, which he otherwise could have done.

Wilmore, contra. An "affray," as defined by Lord Coke, 3 Inst. 158, "is a public offence to the terror of the king's subjects, and so called because it affrighteth and maketh men afraid;" and to the same effect is the definition given in Tomlin's Law Dic. "Affray," and Hawk. P. C. b. 1, c. 63. Here, the only material part of the plea is the statement of an affray, and it would have been good without the further allegation

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as to the person unknown, as there might be an affray without reference to what was done with that particular person. Then, if so, and an "affray" does not necessarily include an assault, the plea could not particularize the affray any more than it does.

[*Coleridge, J.* An affray admits of some particular definition, and the circumstances necessary to constitute that might be stated.]

The plea, as proved, shows sufficient for that purpose. But, further, the plea sets up a justification by virtue of the defendant's authority as captain, which seems to have escaped the notice of the learned judge at the trial, and on that ground the defendant is entitled to a new trial. *Abbott on Shipping*, 6th ed. 188. *Boyce v. Bayliffe*, 1 Camp. 58. Then, as to the other point. The plea justifies the whole trespass. The prostrating on the deck is only the consequence of the assault and beating. In *Bush v. Parker*, 1 Bing. N. C. 72; s. c. 3 Law J. Rep. (n. s.) C. P. 242, there appeared to be a distinct, fresh trespass not justified. Here, the words in the declaration, "and then knocked down," &c., show that it was all one and the same occurrence. *Taylor v. Cole*, 3 Term Rep. 292. *Blunt v. Beaumont*, 2 Cr. M. & R. 412. *Kavanagh v. Gudge*, 7 Man. & G. 316; s. c. 13 Law J. Rep. (n. s.) C. P. 99.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

PATTESON, J. There were two questions in this case: the first, whether the third plea was proved; and the second, whether, if proved, it covered all the trespasses of which the plaintiff gave evidence. [His lordship here stated the declaration and the third plea as above set forth, and then proceeded.] The evidence was conflicting, but the jury found the plea proved, except that the person with whom the plaintiff was fighting was not a passenger and unknown to the defendant Johnson, but that he was the other defendant, (Shore,) the mate of the vessel; and the question is, whether, notwithstanding the failure of the defendant's proof in that respect, he is entitled to have the verdict entered for him upon that plea. It may be that the allegation, that the plaintiff was making a noise, disturbance, and affray, would not without more justify a battery, without, at least, averring a previous request to desist, and even though it was said that the defendant interfered to preserve discipline on board the vessel of which he was captain, the plaintiff being a passenger only. But the defendant alleges further, that the plaintiff was actually fighting with another person on board, and that he interfered to preserve the peace and prevent the plaintiff beating and ill treating such person. This was proved, and if the statement that such third person was a passenger, and his name unknown to the defendant Johnson, can be rejected as an immaterial allegation, and is not matter of description, the defendant would be entitled to the verdict upon the third plea. It was quite immaterial who the person was with whom the plaintiff was fighting. If he was fighting with any one, whoever he might be, the defendant

¹ *PATTESON, COLERIDGE, WIGHTMAN, and ERLE, JJ.*

might justify. It was unimportant whether his name was known or unknown, and we think the plea would have been good if it had merely stated that the plaintiff was fighting with another person, without stating such person's name, or that it was unknown to the defendant. The offence of larceny consisting in taking and carrying away goods and chattels, with intent to deprive the right owner of his property, the indictment must state the owner by name, if known, or the omission must be excused by stating that it is not known. The offence depending mainly upon the ownership, it is necessary that it should be stated if it can be; but in such a case as the present, where nothing can turn upon the identity of the person with whom the plaintiff was fighting, the fact of fighting being all that is material, there can be no reason for requiring the name to be stated or the omission excused.

If, then, it was unnecessary to have described the person with whom the plaintiff was fighting, either by name or otherwise, the plea would have been good, and the defendant entitled to the verdict for him, if the words "then also being a passenger in and on board of the said vessel, and whose name is to the defendant Johnson unknown," had been omitted. That statement may be divided into two parts; first, so much as contains the words "then also being a passenger in and on board the same vessel;" and, secondly, so much as contains the words "and whose name is to the defendant Johnson unknown." The first part does not contain matter of description of the person, character, or condition of the individual, nor are the words "then also being" so much words of description as of allegation and averment; and if not necessarily words of description, that part may be rejected as surplusage, it being quite immaterial whether the person was a passenger or not. The word "being" was considered to be an averment in *The King v. Boyall*, 2 Burr. 832. In *Draper v. Garrat*, 2 B. & C. 2; s. c. 1 Law J. Rep. K. B. 219, a variance between the statement of the suitors before whom a judgment in the county court had been recovered and the proof was holden immaterial, because enough remained, rejecting the part in respect of which the variance arose, to support the pleading. So, in *Lewis v. Waller*, 3 B. & C. 138, n.; s. c. 2 Law J. Rep. K. B. 219, where it was alleged that the plaintiff was an attorney, and that certain libellous matter was published of and concerning the plaintiff, and of and concerning him in his profession, it was held to be no variance that the plaintiff failed to show that it was of and concerning him as attorney, the rest of the allegation being proved, which was enough to maintain the action. The second part of the statement does not contain matter of description, but rather assigns a reason for not stating the name of the person, that it was unknown. This would have been a material allegation if it had been necessary, as in an indictment for larceny, to state the name or to aver that it was unknown, and a failure of the proof in that case might defeat the plea; but, as already stated, we do not think that it was material either that the name should be stated or the omission excused; and, consequently, we are of opinion, that the variance in the proof as to the name being unknown was immaterial. Our judgment, therefore, is, that the ver-

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dict should be entered for the defendant on the third plea. We are, however, of opinion that that plea does not cover all the trespasses proved, and that the knocking down and prostrating the plaintiff are charged distinctly from the assaulting, beating and ill treating justified in the plea; and that the plaintiff is entitled to retain his verdict for 5s. for knocking him down, as distinctly charged in the declaration and proved, and not justified by the plea.

Rule absolute to reduce the damages.

Rule for a new trial discharged.

DANIEL v. MORTON.¹

November 6, 1850.

Ecclesiastical Law — Clergy — Union of Benefices — Non-residence — 1 & 2 Vict. c. 106 — Sequestration — Jurisdiction of Bishop.

The union of two or more benefices cannot be effected without the assent of the patrons.

Quere, whether a union of two benefices during the life of the incumbent is valid.

A, being perpetual curate of W. S., a benefice with cure of souls, was subsequently presented, instituted, and inducted to a rectory, C., also with cure of souls; both benefices being in the diocese of N., and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice, the bishop of N., by an instrument under his episcopal seal, addressed to A, as perpetual curate of W. S. and rector of C., which recited that good causes had been alleged and allowed, united, annexed and incorporated the rectory with the perpetual curacy during the incumbency of A, in the latter, and so long as he should be perpetual curate there, and no longer, by the bishop's ordinary authority, provided that A should keep a sufficient curate to instruct and teach the people of the parish in which he should not reside:—

Held, that the legal effect of this instrument was not to create a union of the two benefices in the proper sense of the term, so that residence in the one produced a non-residence in the other of the two benefices; and that the bishop had jurisdiction, under the 1 & 2 Vict. c. 106, to appoint a curate for the parish in which A did not *de facto* reside, and to enforce payment of the stipend assigned to him, under sect. 83 of that act.

A monition was issued by the bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A had wilfully neglected and refused to pay, and that A and the curate having appeared before him, the bishop heard summarily the said differences, and that the said complaint was duly proved before him, and that he adjudged the same to be true: it then admonished and required A to pay the said arrears. Default being made in payment, a sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend:—

Held, that A could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop.

ASSUMPSIT for money had and received by the defendant to the plaintiff's use.

Plea — Non assumpsit.

At the trial, before Parke, B., at the Norfolk summer assizes, 1848,

¹ 20 Law J. Rep. (N. S.) Q. B. 98.

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a verdict passed for the plaintiff for 25*l.* 11*s.* 9*d.*, subject to the following case:—

The plaintiff was, on the 26th of January, 1835, duly appointed and licensed to the perpetual curacy of West Somerton, in the county of Norfolk, the said perpetual curacy being a benefice with cure of souls; and was, on the 15th of March, 1836, duly presented and instituted and inducted in the rectory of Combs, in the county of Suffolk, the said rectory being also a benefice with cure of souls. In the last-mentioned year, and before the plaintiff was instituted or inducted as last aforesaid, the late lord bishop of Norwich, in whose diocese the parishes of West Somerton and Combs were both situated, did give and grant unto the plaintiff by an instrument in writing, sealed with the episcopal seal of the said bishop, and bearing date the 15th of March, 1836, and which instrument is in the following words: "Henry, by divine permission, bishop of Norwich, &c., to Richard Daniel, clerk, perpetual curate of the perpetual curacy and parish church of West Somerton, in the county of Norfolk, and also to be rector of the rectory and parish church of Combs, in the county of Suffolk, and respectively within our diocese of Norwich and jurisdiction, &c. Whereas divers good causes have been before us alleged, and upon previous and due examination of the same have by us been allowed and approved, we do by these presents unite, annex and incorporate the aforesaid rectory of Combs, with all its rights, &c., to and with the aforesaid perpetual curacy of West Somerton during your incumbency on the same and so long as you shall be perpetual curate there and no longer, by our ordinary authority, and as much as in us lies, and the laws and statutes of this realm do permit, and not otherwise, so that you the aforesaid rectory of Combs, with the aforesaid perpetual curacy of West Somerton, may as one benefice, so long as you are perpetual curate of the said perpetual curacy of West Somerton, retain, and the fruits, &c., of both the said benefices, (the burdens and charges due on the same being by you sustained,) receive, convert, and apply to your own use, freely and lawfully, any ecclesiastical ordinances to the contrary notwithstanding; provided, nevertheless, that you have and keep a sufficient curate, licensed and approved by our ordinary authority, to instruct and teach the people of the parish in which you shall not reside," &c.

On the 9th of August, 1836, the defendant, then being a clerk in holy orders, was duly licensed and approved by the said late bishop to the curacy of West Somerton, being that one of the parishes aforesaid in which the plaintiff did not reside, on the nomination of the plaintiff, at a salary of 50*l.* per annum. And the defendant, having first taken the oaths and subscribed the articles as by law required, from thence until the month of March, 1847, performed the duties of curate of and instructed the people of the said parish. The plaintiff has always continued to hold both preferments, has not been collated or instituted to any other benefice, and has always resided since he became rector of Combs as aforesaid, and still resides in the said parish of Combs, which parish is distant fifty miles from West Somerton, and has not at any time during that period actually resided at West Somerton. On the 17th of April, 1848, the defendant, claiming to be

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sequestrator of the said perpetual curacy of West Somerton, under the authority of the acts and proceedings hereinafter mentioned, demanded and received from the cashier of Queen Anne's bounty a sum of 25*l.* 11*s.* 9*d.*, which was then in the hands of such cashier for the use of the perpetual curate of West Somerton aforesaid, and constituted part of the income of the said curacy; and it is admitted, for the purposes of this action only, that the plaintiff is entitled to hold his verdict for the said last-mentioned sum, unless the court shall be of opinion, under the circumstances of this case, that the defendant had a right to receive the same as sequestrator of the said perpetual curacy.

On the 4th of March, 1846, and while the defendant still continued to be and to perform the duties of curate of West Somerton, under the license of the said Edward, late bishop, hereinbefore mentioned, the present bishop of Norwich gave and delivered to the defendant, with the intention that it should operate as a valid license, a license, under his hand and seal, of which the following is a copy: "Edward, by divine Providence, bishop of Norwich, &c., to John Morton, clerk, greeting. We do by these presents give and grant unto you, in whose fidelity, &c., we do confide, our license and faculty (to continue only during our pleasure, and revocable summarily without process) to perform the office of stipendiary curate in the parish church of West Somerton, &c., on which we find you actually employed by the Rev. Richard Daniel, clerk, the incumbent of the said church, under our license, dated the 9th of August, 1836, and which license, so far only as relates to the stipend thereby assigned to you, we do hereby revoke, &c. And we do hereby assign and appoint unto you, for your maintenance in the said cure, the yearly stipend of 80*l.*, to be paid you half yearly by the said incumbent of the said church," &c.

On the 11th of January, 1848, the said late Edward, bishop of Norwich, issued under his hand and seal a summons to the plaintiff, of which the following is a copy: [The summons, after reciting the license of the 9th of August, 1836, and of the 4th of March, 1846, proceeded,] "And whereas, the said John Morton duly performed the duties of the said curacy from the said month of August, 1836, until the 21st day of December last, on which day the said John Morton gave up the said curacy, in pursuance of notice in that behalf duly given to us and the said Richard Daniel, but hath complained to us that there is now due to him from you, the said Richard Daniel, for the cure of the said church up to the said 21st of December now last past, the sum of 80*l.*, less the income tax; and that you, the said Richard Daniel, have wilfully neglected and refused to pay, and still do wilfully neglect and refuse to pay the said sum of 80*l.*, less the income tax, to the said John Morton. Now we, the said Edward, lord bishop of Norwich, do hereby summon and require you, the said Richard Daniel, to appear before us, at our palace in Norwich, on Friday, the 21st day of January instant, at the hour of 11 o'clock in the forenoon of the same day, to answer the said complaint, when and where we shall proceed summarily to hear and determine the same, pursuant to the provisions of the statute," &c.

Previously to the issuing of the said summons, a certain document,

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signed by the defendant, and purporting to be an affidavit of the defendant, and to have been sworn by him before a surrogate at Great Yarmouth, in the diocese of Norwich, was exhibited to the said bishop at his palace, but not at any court. This document, after stating that the defendant was licensed to the curacy of West Somerton, upon the nomination of the plaintiff, as before mentioned, and reciting the license of the 4th of March, 1846, and that the defendant performed the duties of the curacy from August, 1836, until the 21st of December, 1847, declared that there was due to him from the plaintiff, for the cure of the said church, up to the said 21st of December, the sum of 80*l*. It then stated the plaintiff's refusal to pay the same, and requested the lord bishop to hear and determine the defendant's complaint respecting the non-payment of the said stipend. On the 12th of January, 1848, the aforesaid summons was duly served on the plaintiff, and on the 21st of January, 1848, the plaintiff appeared in pursuance thereof before the said Edward, late bishop, and the defendant also appeared, and the aforesaid document, purporting to be an affidavit of the defendant, was then exhibited to the said bishop, and the defendant was then in the presence of Edward, late bishop, sworn to the truth of the contents of the said document, and the said late bishop then heard the matters in dispute between the plaintiff and the defendant, and verbally decided that the sum of 51*l*. 15*s*. 6*d*. was due from the plaintiff to the defendant, and thereupon the said bishop, on the said 21st day of January, 1848, issued a certain instrument in writing under his hand and seal, purporting to be a monition, of which the following is a copy: [The monition, after stating that the defendant was duly licensed to the curacy of West Somerton, on the nomination of the plaintiff, proceeded,] "And whereas, we, the right reverend Edward, lord bishop of Norwich, on the 4th of March, 1846, you, the said Richard Daniel, being then a non-resident incumbent, within the intent and meaning of the act 1 & 2 Vict. c. 106, that is to say, not having resided on your aforesaid benefice nine months in the years 1843, 1844, and 1845, or any of them, but having, for a period exceeding three months, in the course of every of the years aforesaid, and also from the 31st of December, 1845, until and on the said 4th of March, 1846, absented yourself from your aforesaid benefice, and not having during the times aforesaid performed the ecclesiastical duties of the same, and the said John Morton then being the curate of and employed by you, the said Richard Daniel, and performing the ecclesiastical duties of the said benefice, and serving the said parish church, did, by a license under our hand and seal, bearing date the 4th of March, 1846, assign and appoint unto the said John Morton the yearly stipend of 80*l*., for his maintenance in the said cure, to be paid to him by you, the said Richard Daniel, half yearly. And whereas, differences having arisen between you, the said Richard Daniel, as such perpetual curate and incumbent as aforesaid, and the said John Morton, your said curate as aforesaid, touching the payment of the said stipend and the arrears thereof; and the said John Morton having complained to us that there was due to him from you, the said Richard Daniel, as such perpetual curate and incumbent as

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aforesaid, in respect of the said stipend, and for the arrears thereof, up to the 4th of September, now last past, the sum of 51*l*. 15*s*. 6*d*., after deducting the sum of 1*l*. 11*s*. 2*d*. income tax; and that you, the said Richard Daniel, had wilfully neglected and refused, and still did wilfully neglect and refuse, to pay the said sum of 51*l*. 15*s*. 6*d*., although payment thereof had been duly demanded of you by the said John Morton; and you, the said Richard Daniel, having been duly summoned and required to appear and answer the said complaint of the said John Morton, and having appeared before us pursuant to the said summons, we, the said Edward, lord bishop of Norwich, did proceed summarily to hear and determine the said differences and complaint; and the said complaint was duly proved before us, and we have adjudged the same to be true. Now, therefore, it manifestly appearing to and having been adjudged by us that the said sum of 51*l*. 15*s*. 6*d*. is due to the said John Morton from you, the said Richard Daniel, as such perpetual curate and incumbent as aforesaid, in respect of the said stipend so assigned to the said John Morton by us as aforesaid; and that you, the said Richard Daniel, have wilfully neglected and refused, and do still wilfully neglect and refuse, to pay the said sum of 51*l*. 15*s*. 6*d*. to the said John Morton, we do hereby admonish and require you, the said Richard Daniel, to pay to the said John Morton, on or before the 21st of February now next ensuing, the said sum of 51*l*. 15*s*. 6*d*., or, in default thereof, that you do, on the 22d of February, now next ensuing, at the hour of 11 o'clock in the forenoon of the same day, at our palace in Norwich, show cause to us, by affidavits or otherwise, as the case may require, why sequestration should not issue to enforce the payment of the same," &c.

The aforesaid monition or instrument, in writing, was, on the 6th of February, 1848, personally served upon the plaintiff, and was immediately after such service returned into the consistorial court of the said bishop, and filed in the said court, together with an affidavit of the time and manner of the service thereof. And on the 29th of February, 1848, a writ of sequestration issued under the seal of the consistorial court of the said bishop, which recited, as in the monition last set out, "that the said R. Daniel hath made default in such payment, and hath not shown any sufficient cause by affidavit or otherwise why a sequestration should not issue according to the tenor of the said monition. We have, therefore, thought fit to sequester, and by these presents do, by virtue of the authority to us committed and granted in this behalf, so far as by law we may or can, sequester all and singular the fruits, &c., of and belonging to the perpetual curacy and parish church of West Somerton aforesaid, and to the said R. Daniel, as perpetual curate thereof, and appoint you, the said J. Morton, sequestrator thereof, during our will and pleasure only, giving and granting unto you full power and authority to publish or cause to be published this our sequestration, by affixing a true copy thereof on the door of the parish church of West Somerton aforesaid, or in such other proper and convenient place or places as to you shall seem meet, and by virtue thereof to levy, ask, sue for, recover, and receive into your hands all and singular the said fruits, &c., and by and out thereof to satisfy and

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discharge the aforesaid debt of 51*l.* 15*s.* 6*d.*, due for the serving of the cure of the said church as aforesaid," &c.

The said writ of sequestration was personally served upon the plaintiff, and was afterwards returned into the registry office of the consistorial court of the diocese of Norwich, and there filed, together with an affidavit of the time and manner of the service thereof, and thereupon the defendant took upon himself the office of sequestrator, and as such claimed and received the above-mentioned sum of 25*l.* 11*s.* 9*d.* The arrears in respect of which the proceedings took place before the bishop and the sequestrators were wholly in respect of the difference between the sum of 80*l.* and 50*l.* a year, the latter amount being fully paid and satisfied.

The question for the opinion of the court was, whether the defendant had a right to receive the said sum of 25*l.* 11*s.* 9*d.*, and hold the same against the plaintiff. If the court should be of opinion he had not a right to do so, the verdict for the plaintiff was to stand; otherwise, a verdict was to be entered for the defendant, or a nonsuit, as the court should decide.

O' Malley, (*Byles*, Serj., with him,) for the plaintiff.¹ The question in this case is of considerable importance in the diocese of Norwich, in which a practice of uniting small livings has prevailed. The sequestration issued under the provisions of the 1 & 2 Vict. c. 106, s. 83, which requires the bishop to assign to every curate of a non-resident incumbent (such curate being appointed under sect. 75) a specified stipend proportioned to the value of the living; and in case any difference shall arise between the incumbent and the curate touching such stipend, the bishop is enabled to hear and determine the same; and in case of wilful neglect or refusal to pay such stipend, he may enforce payment by monition and sequestration of the profits of the benefice. The validity, therefore, of this sequestration depends upon the question whether the plaintiff was a non-resident incumbent at the time when the defendant was licensed as curate; and this again turns upon whether the instrument of March 15, 1836, operated as a union of the benefices of West Somerton and Combs, or merely as a dispensation permitting the plaintiff to hold the two livings. If it amounts to a union of the benefices, the residence of the plaintiff upon Combs would be in point of law a residence upon West Somerton, and, therefore, the bishop would have no jurisdiction to license a curate and appoint a stipend under the act as in case of a non-resident incumbent, and the sequestration would be consequently void. Such a union the plaintiff contends took place. The instrument cannot operate as a dispensation, because that is not an act within the power of the bishop. The pope, or archbishop of Canterbury, exercising legatine authority, were the only persons who ever dispensed with pluralities, and dispensations were also granted to particular persons, such as chaplains to peers, and other great officers.

¹ November 12, before LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

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Gibson's Codex, p. 906, and Watson's Clergyman's Law, p. 21. If there is no union here, the living of West Somerton would be avoided by the acceptance of the benefice of Combs; and if so, as the plaintiff could not be incumbent of West Somerton, the sequestration could not issue, and so the defendant would have no right to the money. *Holland's Case*, 4 Rep. 75, *b*, and *Alston v. Atlay*, 7 Ad. & E. 289; s. c. 7 Law J. Rep. (n. s.) Exch. 392. The language of this document is expressly that of a union, not of mere license or dispensation. And a union of benefices was within the ordinary jurisdiction of the bishop of the diocese. Gibson's Codex, p. 918. Unions may be either perpetual or temporary during the incumbency. An instance is given in the appendix to Gibson's Codex, sect. 12, form 1, p. 1531, of a perpetual union by the commissary of the bishop; and another, sect. 12, form 4, of a temporary union by the archbishop of Canterbury, as ordinary within his own diocese.

[*Lord Campbell*, C. J. In what respect does a temporary union differ from a dispensation?]

The dispensation is personal, and authorizes the parson to hold two livings any where; the temporary union is confined to the specified livings, which must both be within the diocese of the bishop incorporating them. *Barbosa Collectanea Doctorum*, tom. 5, p. 225, in *Decreti Gratiani*, part 2, caus. 10, quæst. 3, c. 3.

[*Lord Campbell*, C. J. Can the bishop unite *proprio vigore* without the consent of the patron?]

The precedent in Gibson's Codex seems to show that no such consent is necessary; at all events, where the union is only temporary, it is not, for in that case the patron's interest is not affected. But even if such consent be needed, according to *Austyn v. Trowne*, Cro. Eliz. 500, it need not be given at the same time with, or incorporated into, the act of union; and there being in this case no statement that the patron dissented, the presumption is, that every thing necessary to make a valid union took place. The 21 Hen. 8, c. 13, s. 9, prohibiting unions, applies only where the first living is above 8*l.* value in the king's books, and the 37 Hen. 8, c. 21, which requires the assent of the patron, applies only where one of the livings is not above 6*l.* It is not shown that the value of West Somerton is not above 6*l.* and less than 8*l.* If it be so, the union is not prohibited.

[*Coleridge*, J. Surely it lies on you to establish a valid union.]

The Queen v. Page, Ibid. 719, may be relied on for the defendant, to show that such an instrument as this may be treated as a dispensation so as to effectuate the intention of the party granting it. But there, the person to whom it was given was one of those who, by the 21 Hen. 8, c. 13, are authorized to purchase dispensations; and it could not operate as a union, because it did not come from the bishop, but from the archbishop. The existence of temporary unions is there glanced at in the course of the argument, as being those which are meant by the word "unions" in the 21 Hen. 8, c. 13, s. 10, 11. But, at all events, the bishop had no power to issue the sequestration until the plaintiff had been guilty of a wilful refusal to pay the stipend, and no such fact is here found by the case. There was no notice

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given to the plaintiff that the defendant was performing the duties of curate at an increased salary, nor that the bishop had intervened, and treated the plaintiff as non-resident. Every one of the acts set out were done behind the plaintiff's back.

[*Coleridge, J.* These are merits, which we must assume that the bishop decided, and as to which the plaintiff might have been heard when he was summoned.]

Sir A. Cockburn, Solicitor General, (Couch with him,) contra.

[*Lord Campbell, C. J.* You need not trouble yourself upon the last point.]

If this cannot be supported as a union of the benefices, the plaintiff must fail, because a mere dispensation to hold two livings will not make residence on one residence on both; and moreover, since the 21 Hen. 8, c. 13, no license or dispensation for pluralities can be granted, except by the archbishop. It is plain that no union was here intended by the bishop of Norwich. A union must be permanent; whereas the privilege here granted is limited to the incumbency of the plaintiff. What is called a temporary union cannot exist except as a dispensation, as in the case of *The Queen v. Page*. Com. Dig. "Advowson," F, speaks of a union as consolidating the churches and making them one, and assumes that the consent of the patron is necessary; although, according to *Austyn v. Twyne*, the consent need not be concurrent with, but may follow the act of union. The instrument of dispensation provides that the plaintiff shall keep a curate for that parish in which he shall not reside; and the license granted to the defendant is as curate of West Somerton, not of West Somerton-cum-Combs, as would be the case if the benefices were united. That shows what was intended to be done.

[*Lord Campbell, C. J.* We must look to the legal effect of the document, not to the bishop's intention.]

The sequestration alleges non-residence of the plaintiff. If he seeks to dispute that fact, the *onus* of doing so lies upon him. The object of all the statutes on this subject, since the 21 Hen. 8, c. 13, has been to restrain pluralities. If a union is relied upon, a valid union to which the patron has consented must be positively proved. The 37 Hen. 8, c. 21, applies only to churches within a mile of each other; whereas these two benefices are found to be fifty miles apart. Therefore that act cannot affect the present question.

O'Malley, in reply. There is no authority that a union must necessarily be permanent; and the precedent in Gibson's Codex is in favor of the legality of a temporary union; at all events, if this is void as an act of union, the plaintiff had no incumbency upon which the sequestrator could act. *Betham v. Gregg*, 10 Bing. 352; s. c. 3 Law J. Rep. (N. s.) C. P. 121.

[*Lord Campbell, C. J.* When he is actually in possession of the living, it does not lie in the plaintiff's mouth to say he is not incumbent.]

Cur. adv. vult.

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Judgment was now delivered by

LORD CAMPBELL, C. J. This was a special case, which raised for our determination a question on the validity of a sequestration issued by the late bishop of Norwich, under which the defendant had been appointed sequestrator, and received the sum of 25*l.* 11*s.* 9*d.* If the writ of sequestration had duly issued, it was not denied that the money had been duly received, and that the plaintiff's action would fail. Upon consideration, we are of opinion that the writ of sequestration had duly issued. The plaintiff, in 1835, became perpetual curate of West Somerton, a benefice with cure of souls, and in 1836 was duly presented, instituted, and inducted to the rectory of Combs, also a benefice with cure of souls; both benefices are in the diocese of Norwich, and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice, the then bishop of Norwich, by an instrument under his episcopal seal, which was addressed to the plaintiff as perpetual curate of the former and rector of the latter benefice, and which recited that good causes had been alleged, and on previous and due consideration allowed, united, annexed and incorporated the rectory with the perpetual curacy, during the plaintiff's incumbency on the latter, and so long as he should be perpetual curate there, and no longer, by the bishop's ordinary authority. To this the bishop annexed a condition, that the *plaintiff should keep a sufficient curate, licensed and approved by his ordinary authority, to instruct and teach the people of the parish in which he should not reside.* The defendant, in August, 1836, had been nominated by the plaintiff, and duly licensed and approved of by the bishop, as curate of West Somerton, being that one of the two parishes in which the plaintiff did not *de facto* reside; and his salary was fixed at 50*l.* per annum. The late bishop of Norwich, in 1846, revoked the license so far as regarded the salary, which he raised to 80*l.* per annum. In so doing he proceeded under the 1 & 2 Vict. c. 106, s. 83, and treated the plaintiff as a non-resident incumbent on the perpetual curacy. Differences arose between the plaintiff and the defendant touching the stipend, which the bishop summarily heard and determined, and ultimately, on refusal to pay the arrears which he adjudged to be due, issued the sequestration in question.

If the plaintiff can be considered resident on West Somerton, it is admitted that the bishop had no jurisdiction; but if he be non-resident, no valid objection has been urged either against the authority or the regularity of the bishop's proceedings. The plaintiff contends, that the instrument mentioned in the commencement of this judgment operated as an entire and absolute, though temporary, union of the two benefices, so as to make them during its continuance one; inasmuch that, having constantly resided on the rectory of Combs, he has thereby been resident also on the perpetual curacy of West Somerton.

If the instrument in question be considered as an instrument of union, and tried by the rules, either of the general canon law, or of the canon law which prevails in England, modified by our statutes,

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canons, and decisions, it would be open to many objections. The general law would condemn it as temporary and personal. Such unions were condemned by the council of Trent, sess. 7, c. 4, "*de reformatione*," as cloaks for pluralities; perpetual unions, however, made for just causes it allowed.¹ Ayliffe, on the other hand, doubts whether by our law any perpetual union is permitted, but states that they may be made, "only so long as the bishop sees cause, *having the patron's consent hereunto*." Parergon, 518. (Of the union or consolidation of benefices.) In all the authorities, indeed, and cases, it is either assumed, or laid down, that to the perfection of a union the consent of the patron is necessary; in some cases, the consent of the chapter to the act of the ordinary is stated as a requisite; in others, that of the crown also. It would, probably, not be difficult, if these cases were examined into, to reconcile these seeming differences, by attention to the different circumstances in each, of value, distance, or patronage. But we do not think it necessary for the decision of the present case to pursue that inquiry, for it appears to have been usual in the diocese of Norwich to grant instruments of this kind, and it is not desirable to pronounce any opinion affecting their validity generally, without a more precise statement of all the circumstances than is furnished us in the present instance. Upon the general question, therefore, we pronounce no opinion whatever.

On examination of the instrument on which the plaintiff relies, it does not appear to us that its effect is or was intended to create a union of the benefices in the proper sense of the term; it is true that it uses the terms "unite, annex, and incorporate," which are the proper words for that purpose, and that it authorizes the holding the rectory with the perpetual curacy as one benefice; but we are to look to the legal effect of the whole instrument. In the case of *The Queen v. Page* there were the same words of union, annexation, and incorporation, and there were not the words of dispensation, and yet the court, looking to the whole instrument, gave effect to it, not as a union, but as a dispensation. Now, we here find that the benefices were not intended to be so entirely one that any third benefice of any value, however small or however near, or under any circumstances whatever, could be held at the same time; and what is more important, that it was a condition precedent to the continuing operation of the instrument, that a curate to be licensed by the ordinary should be kept in that parish of the two in which the incumbent should not reside. By its very provisions, therefore, residence on the one was considered to produce non-residence on the other; so that, though for certain purposes the two were to be held as one, that is, that the incumbent might retain the fruits, income, and increase of both without impeachment by any ecclesiastical ordinances, yet this was so qualified, especially as to the matter of residence, that it would be doing violence to the language as well as spirit of the instrument to hold that by virtue of it the plaintiff was otherwise than a non-resident on that benefice of the two from which he was *de facto* absent. We are

¹ See Paul's History of the Council of Trent, p. 235.

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of opinion, therefore, that the plaintiff was a non-resident incumbent, and further, that he was so within the meaning of the 1 & 2 Vict. c. 106, to the provisions of which we are bound to give the fullest effect, framed as they are in the wholesome policy of discountenancing pluralities, and remedying the inconveniences flowing from them, so far as may be, by giving to the ordinary ample powers for providing curates in such cases with adequate salaries, and enforcing summarily the payment of them. It follows that the bishop had jurisdiction, and that our judgment must be for the defendant.

Judgment for the defendant.

DOE d. EVERS & Wife v. CHALLIS & another.¹

December 6, 1850.

Devise — Remoteness — Contingent Remainder — Executory Devise — Construction.

Although where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and if it be too remote, this and all subsequent remainders are void; yet if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder.

A testator gave real property to his daughter Elizabeth for life, and after her decease to such of her children, if a son or sons, who should live to attain the age of twenty-three years, and if a daughter or daughters who should live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; and in case all the children of his said daughter Elizabeth should die, if a son or sons under the age of twenty-three years, or if a daughter under the age of twenty-one years, or if she had none, then the testator gave the said premises unto his son John and his daughters Sarah and Anne, for their respective lives; and upon the decease of his said son and two last-named daughters, he gave the share of such of them so dying unto his or her children, if a son or sons living to attain the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years, his, her, and their heirs and assigns. And in case of the death of his said son or of either of his said two last-mentioned daughters without leaving a child, if a son that should live to attain the age of twenty-three years, or if a daughter who should live to attain the age of twenty-one years, he gave the part and parts such children or child would be entitled to, as aforesaid, unto the child or children of his said son and two last-mentioned daughters having issue, if a son or sons living to the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years; if two of his said last-named children had such children, to them, his or her heirs and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs and assigns, and if only one of them, his said son and two last-mentioned daughters should leave issue that lived, if a son or sons to the age of twenty-three years, or if a daughter or daughters to attain the age of twenty-one years, then he gave the whole of such premises unto such issue, if more than one in equal shares, their respective heirs and assigns, and if only one, to such one, his or her heirs and assigns, at the ages aforesaid.

All the children of the testator named in the will survived him. Elizabeth died, never having had a child; Anne survived Elizabeth, and died, never having had a child; Sarah died, leaving seven children, all of whom attained the prescribed ages; John had two children, who attained the prescribed ages in his lifetime: —

Held, that in the events which happened, the limitation subsequent to the death of Elizabeth without issue took effect by way of contingent remainder, supported by her life estate and vesting immediately on its determination, and that upon the death of Anne without issue, each of the children of John took one twelfth of the property originally devised to Elizabeth: —

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Held, also, that the gift over took effect upon the death of Anne without ever having had any issue, equally as upon her having children who did not live to attain the prescribed ages.

EJECTMENT.

Plea — *Not guilty*.

At the trial, before Coleridge, J., at the sittings for London, after Michaelmas term, 1849, the jury found a special verdict, which stated that Thomas Dolley, being seized of certain freehold premises, duly made and published his will, bearing date the 12th of June, 1819, the parts of which affecting the present question are as follows: "I give to the said Thomas Challis and John Brogden all those my two freehold houses, &c., to hold all the said last-mentioned premises, &c., unto the said T. Challis and J. Brogden, their heirs, &c., according to the tenure thereof, during the natural life of my daughter Anne Dolley, upon trust that they the said T. Challis and J. Brogden, and the survivor of them, do pay or permit my said daughter Anne, from the quarter day next after my decease, to receive and take the rents and profits of the said last-mentioned freehold and leasehold premises, &c., for and during the term of her natural life, to and for her own sole and separate use and benefit only, independent of the debts, control, or engagements of any husband or husbands with whom she may marry. And I do declare that her receipts alone shall only be good discharges for such rents, &c., she, my said daughter Anne, paying all ground rent and keeping all the said premises in good repair, and also the buildings insured from loss or damage by fire. And from and immediately after the decease of my said daughter Anne, I give the said last-mentioned premises unto such child or children as she may have, if a son or sons who shall live to attain the age of twenty-three years, and if a daughter or daughters who shall live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; and in the case of the death of any child or children of her my said daughter Anne, if a son or sons under the age of twenty-three years, and if a daughter or daughters under the age of twenty-one years, the share or shares of each child or children dying under such ages to go to the survivors and survivor of such child and children attaining the said age or ages, their heirs and assigns, in equal shares, as tenants in common. And in case my said daughter Anne has only one child, if a son that shall live to attain the age of twenty-three years, or if a daughter that shall live to the age of twenty-one years, I give all the said last-mentioned premises unto such only child, if a son at his age of twenty-three years, or if a daughter at her age of twenty-one years, his or her heirs and assigns. And further, in case my said daughter Anne shall die without issue, or in case all the children which my said daughter may have shall die, if a son or sons under the age of twenty-three years, or if a daughter or daughters under the age of twenty-one years, then I give all the said last-mentioned premises unto the said T. Challis and J. Brogden, their heirs, &c., during the respective lives of my said son John Dolley and daughters Sarah Ward and Elizabeth Maria Dolley, upon trust to pay or permit my said son and my two last-named daughters to receive and take the rents, profits, and annual income thereof, for and during their respective natural lives, in equal shares;

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the share of my said two daughters to be for their separate uses only, independent of any husband or husbands. And upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons at his or their age of twenty-three years, and if a daughter or daughters at the age of twenty-one years, his, her, and their heirs and assigns, if more than one, in equal shares, as tenants in common, and if only one child, to such only child if a son, at the age of twenty-three years, and if a daughter at the age of twenty-one years, his or her heirs and assigns. And further, in case of the death of my said son, or either of my said two daughters, without leaving a child who shall live to attain the ages aforesaid, I give the part and parts such children or child would have had and been entitled unto as aforesaid unto the child or children of my said son and two daughters having issue living, if a son to attain the age of twenty-three years, or a daughter or daughters living to the age of twenty-one years; if two of my said last-named children have such children or child, to them, her, or him, their, his, or her heirs and assigns, as taking equal shares from his or her father or mother, his, her, and their heirs and assigns, and if only one of them my said son and two daughters leaves issue, if a son that lives to the age of twenty-three years, or if a daughter that lives to attain the age of twenty-one years, then I give the whole of such last-mentioned estate and premises unto such issue, if more than one, in equal shares, their respective heirs and assigns, as tenants in common, and if only one, his or her heirs and assigns.

"I likewise give to the said T. Challis and J. Brogden all those my four other freehold houses, &c., to hold all the said last-mentioned houses, &c., unto the said T. Challis and J. Brogden, their heirs, &c., during the natural life of my daughter Elizabeth Maria Dolley, upon trust that they the said T. Challis and J. Brogden, and the survivor of them, and his heirs, &c., do pay or permit my daughter the said Elizabeth Maria from the quarter day next after my decease to receive and take the rents and profits of the said last-mentioned premises, &c., for and during the term of her natural life, to and for her own sole and separate use only, independent of the debts, control, or engagements of any husband or husbands with whom she may marry. And I declare that her receipt alone shall only be good discharges for all such rents, profits, and proceeds, she, my last-named daughter, keeping all the said premises in good repair and all the buildings insured from loss or damage by fire. And from and immediately after the decease of my said daughter Elizabeth Maria, I give all the said last-mentioned premises, &c., unto such of her children as she may have, if a son or sons who shall live to the age of twenty-three years, and if a daughter or daughters who shall live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; and in case of the death of any child or children which my said daughter Elizabeth Maria may have, if a son or sons under the age or ages of twenty-three years, or if a daughter or daughters under the age of twenty-one years, the share or shares of such child or children so dying to go to the survivors or survivor of such child and children attaining such ages, if more than

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one, their heirs and assigns, in equal shares, as tenants in common. And in case my said daughter Elizabeth Maria has only one child, if a son that shall live to the age of twenty-three years, or if a daughter that shall live to the age of twenty-one years, I give all the said last-mentioned premises unto such only child so attaining such age, his or her heirs and assigns. And also in case all the children of my said daughter Elizabeth Maria shall die, if a son or sons under the age of twenty-three years, or if a daughter under the age of twenty-one years, or if she has none, I give all the said last-mentioned premises unto the said T. Challis and J. Brogden, their heirs, &c., during the respective lives of my said son John Dolley and daughters Sarah Ward and Anne Dolley, upon trust to pay or permit my said son and two last-named daughters to receive and take the rents, profits, and annual income thereof for and during their respective natural lives, in equal shares, the share of my said two daughters to be for their separate uses only, and independent of any husband or husbands. And upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons living to attain the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years, his, her, and their heirs and assigns, if more than one, in equal shares as tenants in common, and if only one child, to such only child, his or her heirs and assigns. And further, in case of the death of my said son or of either of my said two daughters without leaving a child, if a son, that shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons, living to the age of twenty-three years, and if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child, to them, his, or her heirs and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs and assigns; and if only one of them my said son and two daughters leaves issue that lives, if a son or sons to the age of twenty-three years, if a daughter or daughters to attain the age of twenty-one years, then I give the whole of such last-mentioned estate and premises unto such issue, if more than one, in equal shares, their respective heirs and assigns, and if only one, to such one, his or her heirs and assigns, at the ages aforesaid."

The said Thomas Dolley died, seized of the premises in the will and in the declaration mentioned, on the 26th of March, 1821, without altering or revoking the said will. At the time of the execution of his will, and at the time of his death, the said T. Dolley had one son, John Dolley, (mentioned in the will,) and a daughter, the said Anne Dolley, (mentioned in the will,) and another daughter, the said Elizabeth Maria, (mentioned in the will,) and another daughter, the said Sarah Ward, (mentioned in the will,) and a daughter named Margaret Cresswell, who was married to — White, and died in the year 1834. There had been another son besides the said John Dolley; but such other son, whose name was Thomas, was dead before the date of the will. He died unmarried.

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On the 25th of June, 1806, the said John Dolley intermarried with Mary Ann Carr. On the 18th of August, 1838, the said Elizabeth Maria Dolley, having married Joseph Doxsey, died, never having had a child. On the 31st of March, 1847, the said Anne Dolley, having intermarried with one Isaac Aikerman, died, never having had a child. On the 27th of February, 1830, the said Sarah Ward died, leaving seven children, namely, three sons and four daughters, all born before the death of the testator, that is to say, William Ward, who was born in 1804; Sarah Ann, who was born in 1806; Mary, who was born in 1808; Thomas, who was born in 1810; Ellen Jane, who was born in 1812; James, who was born in 1814; and Elizabeth, who was born in January, 1821.

On the 31st of January, 1809, Mary Ann Dolley, one of the lessors of the plaintiff, the child of the said John Dolley and Mary Ann his wife, was born and is still living. The said John Dolley and Mary Ann his wife had two daughters living at the time of the death of the testator, and who were also alive at the death of the said Anne Dolley, namely, Mary Ann Dolley, one of the lessors of the plaintiff, born as aforesaid, on the said 31st of January, 1809, and one Elizabeth Sarah, born the 25th of December, 1820, aforesaid, afterwards married to one G. Huddleston; they (the said John Dolley and Mary Ann his wife) had also a daughter named Clarissa; she was born after the death of the testator, and died an infant, that is to say, about a year after her birth. On the 21st of December, 1834, the said Mary Ann Dolley, one of the lessors of the plaintiff, married T. H. Evers, one of the lessors of the plaintiff. The said John Dolley, mentioned in the will, was and is the eldest son of the said testator and his wife, and the heir at law of the said testator, and is still living. But whether or not, &c.

Malins, for the lessors of the plaintiff.¹ The question in this case turns upon the validity of the gifts over contained in the devises to Anne Dolley and Elizabeth Maria Dolley, under each of which the lessors of the plaintiff claim one twelfth part of the property thereby devised. These two devises are precisely the same in substance, and it will, therefore, be necessary only to direct the argument to one of them, viz., that which gives the property to trustees in trust for Elizabeth Maria for life, and after her death gives it to such of her children, if a son as shall live to the age of twenty-three, and if a daughter as shall live to the age of twenty-one, their respective heirs and assigns, as tenants in common; and in case of the death of any of the children, if a son under the age of twenty-three, or if a daughter under the age of twenty-one, the shares of the children so dying, to go to the survivors attaining such ages, if more than one, in equal shares as tenants in common, and if there should be only one child who should live to attain such ages, the whole to go to such child, his or her heirs, and assigns. And "in case all the children of my

¹ November 19, before LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ELLER, JJ.

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said daughter Elizabeth Maria shall die, if a son, or sons under the age of twenty-three, or if a daughter under the age of twenty-one years, or if she has none," the testator gave the property in trust for his son John Dolley, and his daughters Sarah and Anne Dolley, during their respective lives; and upon the decease of either of his said son and daughters he gave the share of such of them so dying to his or her children, if a son or sons, living to attain the age of twenty-three, and if a daughter or daughters, living to attain the age of twenty-one, his, her, or their heirs and assigns as tenants in common; and in case of the death of his said son, or either of his said daughters, "without leaving a child, if a son that shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years," he gave the part or parts such children or child would be entitled to as aforesaid, to the child or children of his said son and two daughters having issue, if a son living to the age of twenty-three years, and if a daughter living to attain the age of twenty-one years; and if only one of his said son or two daughters had issue, living to attain these respective ages, he gave the whole to such issue, if more than one, in equal shares, and if only one to such one child in fee. Under the events which happened, the gift over took effect in favor of the children of John Dolley and Sarah Dolley. Elizabeth Maria died in August, 1838, without ever having had any issue; therefore, the gift over then took effect as to one third in favor of the children of Sarah, who attained the prescribed ages, and as to one third in favor of Anne for life, and as to the remaining one third in favor of the said John Dolley for life, with remainder to his children who should attain the prescribed ages in equal shares. At the death of Anne, without issue, her share went over among the children of her brother and sister who lived to attain the required ages, *per stirpes*, and as representing their parent. Therefore, Anne's third would go in moieties to the children of John and Sarah; and John having two daughters who lived to attain twenty-one, each of them took one twelfth of the property originally devised to Elizabeth Maria, and to such a share Mrs. Evers, one of the lessors of the plaintiff, is now entitled to succeed. In *Doe d. Dolley v. Ward*, 9 Ad. & E. 582; s. c. 8 Law J. Rep. (N. S.) Q. B. 154, this court has already decided upon another portion of this will, where the words of the limitation are materially different from the present. The present claim rests solely on the gift over of Anne's share. The effect of the whole devise is, in the events which have happened, to give a contingent remainder with a treble aspect. Elizabeth Maria takes an estate for life, (whether legal or equitable is now immaterial,) with a contingent remainder to such of her children as shall attain a specific age, if she has any; if there are no such children, then to the son and two other daughters of the testator for life, with a like contingent remainder to their children attaining the specified ages, and if any of them die without such issue, then it is a contingent remainder to such of the children of the other two families as may fulfil the condition. *Doe d. Herbert v. Selby*, 2 B. & C. 926, is very like this case; there the devise was to G. for life, and after his

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decease to all and every his children and their heirs forever as tenants in common; but if G. should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then over to three persons in fee; and it was held that, on the death of G. without issue, the devise over took effect as a contingent remainder. Bayley, J., there says, "If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect; and if the estate vests in the one it cannot in the other. *Loddington v. Kime*, 3 Lev. 431. But it may happen that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, and in the other as an executory devise." That is exactly the case here; if Elizabeth Maria had left any child, such child would have taken a fee, and the gift over to John, Sarah, and Anne could have taken effect only by way of executory devise; but, according to the event, John, Sarah, and Anne took a contingent remainder, supported by the previous life estate to Elizabeth Maria; and Anne never having any issue, the remainder over as to her share was also contingent. It will be argued, however, that as Anne's share was only to go over in case she died "without leaving a child who shall live to attain the age aforesaid," the precise event has never happened, and that the event of her never having had a child at all is not included, as it is expressly in the gift over after the decease of Elizabeth Maria; but the intention clearly is, that the share of such of them as die without children, such as could take under the preceding devise, should go over to the children of the others if they attain the required ages. *Ginger v. White*, Willes, 548. *Goodright v. Dunham*, Dougl. 264. *Doe d. Herbert v. Selby*, and *Malcolm v. Taylor*, 2 Russ. & M. 416. According to the recognized principle of construction, if a testator provides for an event happening in a particular manner, and it does not happen exactly in that manner, the court will look to the substance of the gift, and give it effect accordingly. 2 Jarman on Wills, p. 702. *Gulliver v. Wicket*, 1 Wils. C. C. 105. *Meadows v. Parry*, 1 Ves. & B. 124. *Murray v. Jones*, 2 Ibid. 313. *Mackinnon v. Sewell*, 5 Sim. 78; s. c. 2 Myl. & K. 202; s. c. 3 Law J. Rep. (N. s.) Exch. 161. *Wilson v. Mount*, 2 Beav. 397; 4 Jur. 262. Another objection may be raised on the score of remoteness; but *Cole v. Sewell*, 4 Dru. & War. 1; s. c. 2 House of Lords' Cases, 186, shows that remoteness applies only where the gift takes effect as an executory devise, and is out of the question where it is a contingent remainder. *Festing v. Allen*, 12 Mee. & W. 279; s. c. 13 Law J. Rep. (N. s.) Exch. 74, is an authority that the contingency continues until the children who are *in esse* attain the prescribed age; the verdict finds that Mrs. Evers had attained twenty-one when Anne Dolley died.

Peacock, for the defendants. It is agreed that there is no substantial difference between the limitations to Anne and to Elizabeth

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Maria, and, therefore, it will be only necessary to direct the argument to one of them, that to Elizabeth Maria. As to the construction of the gift to the children of the testator's son and two daughters: first, it is an executory devise, which may be too remote either as to the event in which the children are to take, or as to the parties who are to take. The event is the death of the testator's son, or either of his daughters, without leaving a child, who, if a son, shall attain the age of twenty-three; before that event can be decided, more than twenty-one years from the death of the testator's son or daughter may have elapsed, as either of them might die leaving a son only one year old. That would be too remote an event, unless it be held that the estate vests in the child immediately on its parent's death. But if that were so, then the condition upon which the estate is to be divested would be too remote, and so the child would take absolutely, which is clearly not the testator's intention. Again, is the meaning of the words to give the estate to those of the children who have attained the prescribed ages at the time of their parent's death, or to all the children who shall attain those ages? It is clearly not the intention that if the son or either of the daughters died leaving one son aged twenty-three and another only twenty-two, the whole should vest in the former. The plaintiff endeavors to obviate the objection of remoteness by referring to the events which have actually happened; but that is not a proper mode of construing a devise. The limitations must appear to be good or bad on the face of them, and without reference to what has, in fact, occurred. Lewis on Perpetuities, p. 170. If a possible case can be put in which the gift over could not take effect until after the determination of a life or lives in being and twenty-one years, it is void for remoteness. The death of Anne without having had a child at all cannot fulfil the prescribed condition. Such an event is, no doubt, included in the event which is prescribed, but it cannot be distinguished as a separate event on which the estate will go over. It might as well be said that leaving a child under twenty-four would fulfil a condition of leaving a child under twenty-one. No case can be cited in which an event merely included has been thus separated. *Doe d. Herbert v. Selby*, on which reliance is placed for the lessors of the plaintiff, did not depend at all upon the doctrine of remoteness. In *Festing v. Allen* it was held, that when the first contingent remainder failed, the second contingent remainder supported by the same life estate did not come into operation.

[*Lord Campbell*, C. J. It was not held that the remainders were void.]

The words there were also very different from those of the present gift. *Doe d. Dolley v. Ward* is very distinguishable, for the gift here is not to children at twenty-three or twenty-one absolutely, but contingently if they shall attain those ages. *Bull v. Pritchard*, 1 Russ. 213; s. c. 7 Law J. Rep. Chanc. 41. *Duffield v. Duffield*, 1 Dow & Cl. 268. *Newman v. Newman*, 10 Sim. 51; s. c. 8 Law J. Rep. (N. S.) Chanc. 354. *Blagrove v. Hancock*, 16 Sim. 371; s. c. 18 Law J. Rep. (N. S.) Chanc. 20.

[*Lord Campbell*, C. J. You say that it is only by way of executory

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devise that there can be a limitation of a fee upon a fee; and here, as an executory devise, the limitation is bad for remoteness.]

Yes; the uncertainty both as to time — *Proctor v. The Bishop of Bath and Wells*, 2 H. Black, 358—and the persons who are to take, makes the limitation too remote.

Malins, in reply. The principle as to remoteness is not disputed. The limitations here are not by way of executory devise, but are a series of contingent alternative remainders. If Anne had had a son, there might have been a doubt upon the ground of remoteness; but in the present case, that which during Anne's life was a contingent remainder to her children has simply failed, the latter event in the limitation not being too remote. It is enough if an event not bad for remoteness be included in the limitation, although not specifically distinguished, and that such event has happened. *Goring v. Howard*, 16 Sim. 395; s. c. 18 Law J. Rep. (N. S.) Chanc. 105. The limitations may be decided by the events and not *a priori*, and in construing the operation of the will the court must look at the event. In *Blagrove v. Hancock*, the question of contingent remainder was not once mooted, nor could it have been. In *Bull v. Pritchard*, the limitation was held bad for remoteness as to the personalty, and it would seem to have been assumed that as to the realty it was otherwise. The decisions in *Newman v. Newman*, referred to in support of the passage in *Lewis on Perpetuities*, as well as *Leake v. Robinson*, 2 Mer. 363, relates to personalty, and are not questioned here. *Festing v. Allen* has been relied upon; but in that case there were children at the death of the tenant for life, which distinguishes it from the present case, as appears from the judgment at p. 301 of the report. In *Duffield v. Duffield*, as in *Proctor v. The Bishop of Bath and Wells*, there was no particular estate to allow of the will being construed by the event.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. On this special verdict we are of opinion that the lessors of the plaintiff are entitled to our judgment. First, we have to examine their claim to one twelfth of the freehold property contained in the devise to Elizabeth Maria Dolley. This depends upon the limitation over in case all the children of Elizabeth Maria Dolley should die under the ages specified, or if she should have none. If valid, in the events which have happened, this would vest one third in Anne Dolley, and on her death, the twelfth claimed in Mrs. Evers, (late Mary Anne Dolley,) one of the lessors of the plaintiff.

On the part of the defendant, who claims under the eldest son and heir at law of the testator, it is first contended, that the limitation is void because it could only take effect by way of executory devise, and that the executory devise would be bad as being too remote. If Elizabeth Maria had died, leaving children, this objection would have been fatal, for upon her death the property would have vested in them as tenants in common in fee, according to the decision of this court upon this

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very will, in *Doe d. Dolley v. Ward*. The subsequent limitation, therefore, could only have taken effect by way of executory devise, and as the gift over was upon the death of the children of Elizabeth Maria, if a son or sons under the age of twenty-three, or if a daughter or daughters under the age of twenty-one, this would have been contrary to the rules against perpetuities, and void. But in the event which happened, the contingent remainder to the children of Elizabeth Maria never took effect, she never having had a child; and the question is, whether in this event the subsequent limitation may not take effect as a contingent remainder, supported by the life estate of Elizabeth Maria, and vesting immediately on the determination of that life estate. Although where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and if it be too remote, this and all subsequent remainders are void, if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. "An estate may be devised over in either of two events; and in one event the devise may operate as a contingent remainder, in the other as an executory devise." This is the language of Bayley, J., in *Doe d. Herbert v. Selby*, a case which seems to us to govern the present. There the testator devised freehold property, "to my son George for life, and after his decease unto all and every the child and children of my son George and their heirs forever, as tenants in common; but if my son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one, or without lawful issue, then I devise the same estates to my son Thomas, my daughter Anne, and my son-in-law, William Duke, and their heirs forever, as tenants in common." Now, if George had died leaving children, the fee would immediately have vested in them, and the limitation over to Thomas, Anne, and William Duke could only have taken effect as an executory devise. But the court of king's bench clearly held that as George died without having had a child, the limitation over was to be construed a contingent remainder. The question arose from George in his lifetime having suffered a recovery. In the event which happened, if the limitation in favor of Thomas, Anne, and William Duke was to be taken as a contingent remainder, it was barred by the recovery; but if as an executory devise, it was not. Bayley, J., presiding here in the absence of Lord Chief Justice Abbott, said, "If George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder." Holroyd and Littledale, JJ., fully concurred, and the consequence followed that the remainder over to Thomas, Anne, and William Duke, continuing to be a contingent remainder, was barred by the recovery which, destroying the particular estate, left it without support. It has been remarked, that in *Doe d. Herbert v. Selby*, instead of saying the limitation was a contingent remainder in one event, and an executory devise in the other, it would be more accurate to say, there

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were two alternative remainders in fee, one of which was contingent, and was subject to an executory limitation in favor of the same person who would have been the object of the alternative remainder. But whatever may be the technical language in which the limitations should be described, it was decided that if the first contingent remainder never vested, the second limitation would take effect as a contingent remainder.

This decision, which is founded on prior authorities, and has never been questioned, seems to us quite sufficient to show that, in construing the will of Thomas Dolley, the limitation of the property left to Elizabeth Maria, after her children, is to be considered as taking effect as a contingent remainder.

Another objection made was upon the language of the remainder over, "unto the child or children of my said son and two daughters," which is only in express words, "in case of the death of my said son or either of my said two daughters without leaving a child, if a son that shall live to attain the age of twenty-three years, or if a daughter who shall live to attain the age of twenty-one years," without saying with respect to his daughter Anne Dolley, "if she has none," — the argument being that as Anne never had a child, the contingency has not arisen on which her share was devised to the children of John Dolley. But we consider it quite clear from the testator's language that he intended this remainder to take effect upon his daughter Anne having no children, in like manner as upon her having children, and dying without leaving children who should live to the required age. There is a long string of cases to support the doctrine, that if there be a gift over on a class dying within a particular age, it takes effect if that class never comes into existence. I consider it sufficient to mention the first of them, which has been often acted upon, *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245, where a testator bequeathed a term of years to his wife for life, and after her death to the child she was then *enceinte* with, and if such child should die before the age of twenty-one, then one third to his wife, and the other two thirds to other persons; the wife was not *enceinte*, but Lord Harcourt, and afterwards the court of king's bench, held that the bequests over took effect. The lessors of the plaintiff likewise claiming one twelfth of the freehold property devised by the testator to his daughter Anne Dolley, it was admitted that this claim was not liable to any objection which was not urged against the former, and, therefore, our judgment will be in favor of the lessors of the plaintiff for both the twelfths which are claimed.

Judgment for the lessors of the plaintiff accordingly.

Regina v. Latimer.

REGINA v. LATIMER.¹

November 25, 1850.

Costs, Defendant's Right to — Criminal Information — Libel — Plea of not Guilty — 6 & 7 Vict. c. 96, s. 8 — Certificate of Judge — 4 & 5 W. & M. c. 18, s. 2.

Where, in a criminal information for a libel, the defendant recovers a verdict and judgment, he is entitled to recover from the prosecutor the costs sustained by reason of the information, under the 6 & 7 Vict. c. 96, s. 8, although the only plea upon the record is not guilty, and the judge at the trial certifies, under the 4 & 5 W. & M. c. 18, s. 2, that there was reasonable cause for exhibiting such information.

CRIMINAL information for a libel. Plea — Not guilty.

On the trial before Coleridge, J., at the last assizes at Exeter, the defendant had a verdict, and the learned judge certified, under the 4 & 5 W. & M. c. 18, s. 2, "that there was reasonable cause for exhibiting such information." Subsequently, a side bar rule was applied for and obtained to tax the defendant's costs under the 6 & 7 Vict. c. 96, s. 8,² notwithstanding the certificate so granted.

Crowder (*Butt* and *Coleridge* with him) now moved for a rule calling upon the defendant to show cause why the side bar rule should not be set aside. The 4 & 5 W. & M. c. 18, s. 2, has not been repealed, and ought to be read together with the 6 & 7 Vict. c. 96, s. 8; and if so, then the power of the judge to grant a certificate, as in this case, remains, and the defendant is not now entitled to costs. No case has as yet put a construction on the 8th section of the later act; and if the construction contended for by the defendant be correct, when the defendant has a verdict upon not guilty he will have his costs; but if the prosecutor succeed, he will not, and no such intention is shown by the act. The first part of this 8th section applies only to cases specially within the same act, namely, cases in which there is a plea of justification under the 6th section; and construed in that way, it applies equally to both parties. If the plea of not guilty be added to a plea of justification, and the publication of the libel were proved, but the defendant had a verdict upon the special plea, the defendant would not then be entitled to his costs, inasmuch as judgment would not be given for him, as required by the 8th section. The two statutes may stand together, so as to make the certificate of the judge applicable to the 8th section, where, as here, the only plea is not guilty.

¹ 20 Law J. Rep. (N. S.) Q. B. 129.

² Sect. 8. "That in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, and that upon a special plea of justification to such indictment or information if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried."

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Greenwood and *Collier* appeared to show cause in the first instance, but were not heard.

LORD CAMPBELL, C. J. I feel no doubt in this case. We must look to the language used by the legislature in considering the intention of the 6 & 7 Vict. c. 96. Sect. 8 has two branches, and upon the second branch we are not now called upon to say any thing, but only as to the first. The question is, whether under the circumstances the defendant is entitled to the costs to which he has been put. I think the intention of the act was to give him such costs. I hardly know of any language more explicit that could have been used for that purpose. [His lordship read the section.] *Prima facie* that applies to this case. We are asked, however, to allow the plaintiff to take advantage of the former act, 4 & 5 W. & M. c. 18, by the second section of which, costs are not allowed to defendants where the judge at the trial shall certify that there was reasonable cause for exhibiting the information. But by the 6 & 7 Vict. c. 96, no such power is given; and I must say the legislature might not unreasonably enact, that there should be a change in that respect in the law. It is not unreasonable that the defendant should be reimbursed his expenses, brought about by a prosecution which proves unfounded, and in which the defendant has been found not guilty by a jury of his country. We are, however, to look solely to what the legislature has said, and it seems to me the section admits of no reasonable doubt, and that the rule ought not to be granted.

COLERIDGE, J. There seems to me great reason for believing that the construction now put upon the 8th section of the 6 & 7 Vict. c. 96, was not in the minds of the framers of the act, because a great change in the law was made by the act, and as to this particular part of such change, no express direction on the subject is given in the act. At the same time, however, the very circumstance that a great change was introduced into the law at the time, makes it not unreasonable to suppose that this might have been a part of such change. The words of the section are very plain and unambiguous, and giving to those words their full and natural meaning, I think the present rule ought not to be granted.

WIGHTMAN, J., concurred.

ERLE, J. The enactment is quite general in its effect as to an indictment for libel, and there is no doubt about the right to costs in such a case. Then, can it be said, that a different rule was intended with respect to criminal informations for libel, when the language runs as it does in the section in question? The argument is that by reason of the former act remaining unrepealed, the words of this section ought to be construed to give not an absolute but a qualified right to the costs. But it seems to me the words of the later statute must have the effect of giving such absolute right, and that we have no right to import any relief from the other act.

Rule refused.

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PEARDON v. UNDERHILL & another.¹

December 3 and 7, 1850.

Trespass qu. cl. fr. — Plea of Justification — Right of Common of Turbary — Enclosure from Common — Prescription — Evidence of general Right — Presumption as to original Grant.

Trespass for breaking and entering a close of the plaintiff, and breaking down a wall. Pleas, justifying the alleged trespass under the exercise of a right of common of turbary enjoyed by prescription in, upon and throughout Gidley Common, whereof the said close in which, &c., was parcel, and from which it had been wrongfully enclosed. Replications traversing the "said common of turbary in, upon, and throughout the said close in which, &c., *modo et forma*." Common of turbary had existed and had been exercised over Gidley Common generally; but with respect to the spot in question, before it was enclosed, the jury found that within living memory it had not been capable of growing turf for fuel, or any thing in the nature of turf:—

Held, that under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the *locus in quo*, and that the defendants were not tied down to show an actual exercise of the right over the particular spot; but that such inference could not be made, when it appeared in effect that from time immemorial it had been impossible to exercise the right over the *locus in quo*.

TRESPASS for breaking and entering a certain close, being a garden abutting on a certain cottage in the occupation of the plaintiff and on all other sides thereof on a certain common or waste, called Gidley Common, and knocking down a certain wall standing and being upon the said close.

The defendants, amongst other pleas, pleaded, eighthly, that for the period of thirty years the occupiers of a certain messuage had used and enjoyed as of right and without interruption, common of turbary in, upon, and throughout Gidley Common, whereof the said close in which, &c., for the full period of thirty years had been and was parcel, that was to say, to cut, dig and take turf and peat, in and upon the said common, and to carry away the same for necessary fuel to be consumed in and upon the said messuage, with the appurtenances. That at the said time when, &c., one W. B. was the occupier of the said messuage, with the appurtenances, and because the said close in which, &c., before and at the said time, when, &c., was wrongfully enclosed, separated, and divided from the residue of the said common, by means of the said wall, in the declaration mentioned, and the same was then wrongfully standing in and upon the said close, so that without breaking down the said wall the said W. B. could not have, use, or enjoy his said common of turbary in, upon, and throughout the said close, they, the defendants, by the authority and as the servants of the said W. B., committed the alleged trespass. The ninth plea in the same manner justified the committing of the trespass, alleging sixty years' enjoyment of a common of turbary over Gidley Common, whereof the *locus in quo* was parcel. The tenth plea alleged a similar right of common of turbary by immemorial usage in the defendant James Underhill, and those of whose estate at the said time when, &c., he was seized in a certain

¹ 20 LAW J. REP. (N. S.) Q. B. 133.

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messuage, with the appurtenances, over, in, upon and throughout Gidley Common, whereof the said close in which, &c., was parcel. It then averred an existing lease of the said messuage, with the appurtenances, from the defendant Underhill to W. B., and justified the committing the alleged trespass by the defendants, as the servants and by the authority of W. B., by reason that the said close, in which, &c., was wrongfully enclosed and separated from the residue of the said common by means of the said wall, so that without breaking it down, the said common of turbary could not be enjoyed in, upon and throughout the said close.

Replication to the eighth plea, traversing the enjoyment of the said common of turbary in, upon and throughout the said close, in which, &c., in manner and form as in that plea alleged. The replications to the ninth and tenth pleas, in the same manner traversed the rights of common of turbary alleged in each of the said pleas, *modo et forma*.

On the trial, before Erle, J., at the Devon Spring Assizes, 1850, it appeared that the plaintiff claimed under the lord of the manor, who was seized in fee of Gidley Common. That the *locus in quo* was a part of the common, which had been enclosed and converted into a garden. Over Gidley Common, generally, which was an extensive waste, the defendants had exercised a right of common of turbary, and as against the enjoyment of such right it was admitted the plaintiff could have no right to enclose. The particular spot in question before it was enclosed, was a barren, rocky place, which required to be blasted, and covered with soil brought from a distance, in order to convert it into a garden, and upon it and for some distance around, no turfs had ever been obtained. The jury also expressly found that the spot had not been capable of growing turf for fuel, or any thing in the nature of turf, so far back as living memory went; and under the direction of the learned judge a verdict was entered for the plaintiff on all the above pleas, leave being reserved to move to set that verdict aside, and to enter a verdict for the defendants instead. In Easter term following, a rule *nisi* for that purpose was obtained, against which

Crowder and *Greenwood* now (December 3 and 7) showed cause. The right to cut turf on the parts of Gidley Common, where turf was to be found, is not disputed; but the question is, whether, upon the issues raised, the defendants can be said to have common of turbary over the *locus in quo*, it having been proved and found by the jury that the particular spot, from its very nature, was not capable of producing turfs. Under the issues raised it was necessary to show a right of common of turbary over the *locus in quo*, for, although such right existed over the common generally, the lord could not be deprived of his right to enclose particular spots, where no turf grew, and consequently, upon the express finding here, the right of turbary was not interfered with. Common of turbary, unlike common of pasture, rests entirely on the common law; *Duberley v. Page*, 2 Term Rep. 391; *Fawcett v. Strickland*, 6 Term Rep. 747 n.; and must necessarily be by direct grant. 2 Co. Inst. 85. *Grant v. Gunner*, 1 Taunt. 435. The

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statute of Merton, 20 Hen. 3, c. 4, relating to common of pasture only, was passed to alter the rights as between lord and tenant, and the statute of Westminster 2d, 13 Edw. 1, as between lord and stranger. 2 Co. Inst. 475. The reasoning in *Fawcett v. Strickland* applies strongly here in favor of the right to enclose. The plaintiff could not properly have replied otherwise than he has. The general right over the common is passed by, and issue taken as to the right over the *locus in quo*.

[*Patteson, J.*, referred to *Harpur v. Painter*, 1 Wms. Saund. 268, a, note.]

In *Arlett v. Ellis*, 7 B. & C. 346; s. c. 5 Law J. Rep. K. B. 301, all the authorities are referred to. There a right of common of turbary over the *locus in quo* was found by the jury; and the decision goes no farther than to establish that there may be a custom in the lord to enclose against such right. But the observations of Bayley and Holroyd, JJ., in giving judgment, are in favor of the plaintiff. Unless proof of the existence of the right over the *locus in quo* be required, a most unreasonable presumption would be made against the lord. Turbary over one hundred acres only would have the effect of precluding the lord from the use of several other acres of a waste. In *Glover v. Lane*, 3 Term Rep. 445 Buller, J., says, "I should have no difficulty in saying, that at common law the lord might have approved as much in cases of common by grant, as of common appendant."

Butt and Field, contra. There was no question made at the trial as to there being no evidence of a right of common of turbary. The general right was established, and the replication does not narrow the issue, so as to make it necessary that the plaintiff should have proved an actual enjoyment of the right over the *locus in quo*. The replication in effect is no more than that of *de injuria*, taking the double issue offered by the pleas. The substantial issue is as to the existence of the right, and the grant to be inferred from the evidence is one extending over every part of the common, and the exception contended for cannot properly be made. There is a distinction to be made between the existence of the right and the enjoyment of it. It is consistent with the finding of the jury, that turfs may, at some distant period, have grown on the spot in question, or that the rocks might have been removed and the ground thereafter become capable of growing turfs. The right of turbary is not confined to places producing turf at the time of the presumed grant; it extends to parts of the common on which turf might at any time afterwards grow. Suppose the grant of a right of piscary in a pond, and no fish had been found for one hundred years, still the right would exist so as to support an action for draining off the water, or enclosing the pond. The law as laid down with reference to the right of the lord to approve under the statutes of Westminster and Merton, and at common law, is not disputed; but that right does not extend to common of turbary. *Glover v. Lane* decides no more than the right to approve as against common of pasture.

[*Patteson, J.*, referred to *Maxwell v. Martin*, 6 Bing. 522; s. c. 8 Law J. Rep. C. P. 174.]

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In that case the right claimed was admitted to exist, except as to the *locus in quo*. Here the question is very different, for the right over the whole common generally has been conceded, and therefore, in point of law, it extends to the spot in question. The question is one of evidence, and not of pleading. They referred to *Stanley v. White*, 14 East, 332. *Willis v. Ward*, 2 Chit. Rep. 297. *Arlett v. Ellis*.

PATTESON, J. The replication, in form, certainly does appear to narrow the issue; but it is not to be taken upon these pleadings that the plaintiff was necessarily tied down to show an exercise of the right of turbary over the particular spot, which is alleged here to be a part of a large extent of common. What he must prove is, that, having the right over the waste generally, it had been exercised under such circumstances with respect to the immediate neighborhood of the spot in question, and its accessibility and the nature of the soil, as put by Tindal, C. J., in *Maxwell v. Martin*, as that the jury might be warranted in inferring that the original grant extended to the place in question. In that case it was not denied by the replication that the lords leys was part of the waste of B common. The only traverse was of the right claimed in the plea to dig stones in the lords leys. The admissions in the case were clear and full. The plaintiff admitted the defendant's right to dig stone over Brockeridge Common, with the exception of the parts of it called the "lords leys," and the defendant admitted that he had no evidence to prove the exercise of the right on the lords leys.

The court said, that it was not necessary to prove the digging of stones on the very spot in question, but that it was enough to show circumstances from which the jury could infer that the right claimed was included in the original grant, and the defendant not being able to produce such evidence, the verdict, it was held, must be entered for the plaintiff. I cannot distinguish that case from the present. Common of turbary is not of the same description as common of pasture. It can only be in a place of such a nature as that turfs could be there, where, so to speak, turf is found. Here the jury find that there never had been any turf on the spot in question from time immemorial, (they were not asked whether there would be, for that would not have been a proper question,) and, therefore, they do not draw the inference that the original grant extended to the place in question. No evidence of the exercise of the right of turbary over other parts of the common, for the purpose of showing the existence of the right over the place in question, was excluded. But the inference drawn by the jury is, that the grant of the right of turbary did not apply to a place like that in question; and, under the circumstances, it seems to me that there was not any evidence from which the jury could infer that the original grant extended to such place, and, therefore, that the verdict was rightly found for the plaintiff.

COLERIDGE, J. I am of the same opinion, and I confine myself strictly to the facts of this particular case. The grant alleged in the plea extends to the whole of the common, and it is admitted that the

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locus in quo is part of the common. It is true, therefore, that the *locus in quo* may be said to be within the grant, but it is not so absolutely true with respect to the right claimed, as that the contrary may not be shown; and the question really is, What was the grant first made upon which the defendant relies? I take it, the finding of the jury is, that from the time of legal memory, and if from that time it may be almost said from the time of the flood, it has been impossible for turf to be produced on the *locus in quo*; and, therefore, to suppose the grant to extend to that spot, would be to suppose an absurd grant and an impossibility. It is simply a question of evidence; and from the evidence here, it is not to be inferred that the spot in question is within the grant.

WIGHTMAN, J. I did not hear the case argued, and therefore do not take part in the judgment.

ERLE, J. I am of the same opinion. The defendant is entitled under the admission to the full benefit of all the evidence that by possibility could have arisen. It is just as if it had been proved that turf had been taken on every part of the common upon which turf was found; and the question is, What is the original grant to be presumed from that evidence? Why, what but a grant correlative with the right, the exercise of which has been shown, namely, to all parts of the common where turf might be found. Then, if the grant were produced, it could not be held to extend to a place, of which the fact found here, with respect to the spot in question, could be predicated; and if so, neither can it be inferred that the terms of the supposed grant apply to a place where the right claimed cannot be exercised; and that being so, without wishing at all to infringe upon the rule of evidence as laid down in *Maxwell v. Martin*, I think, in accordance with the authority in that case, that there was no sufficient evidence from which to infer a supposed grant as to the spot in question, and, therefore, that the verdict should stand for the plaintiff.

Rule discharged.

DELLER v. PRICKETT & another.¹

November 25, 1850.

Auctioneer — Action against; to recover back — Practice.

Where an auctioneer, against whom an action was brought to recover the deposit on a sale by auction of real estate, upon the ground that the vendor's title was defective, applied for an interpleader rule, and it appeared that the vendor had no other property except that of which the title was disputed, the court refused the application, unless the defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit.

ASSUMPSIT for money had and received. The defendants, who

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were auctioneers, had sold by auction certain copyhold premises to the plaintiff on behalf of one Sarah Rouse; and the action was brought to recover the deposit money then paid by the plaintiff, upon the ground that the vendor had failed to make a good title, according to the conditions of sale. The deposit money was also claimed by the vendor, who threatened to proceed for its recovery, upon the ground that a good title had been made out. In Trinity term, June 12, 1850, —

Davison obtained an interpleader rule, calling upon the plaintiff and the vendor to state their respective claims to the deposit money.

It appeared from an affidavit in opposition to the rule, that the vendor had no other property except the premises sold, her title to which was disputed.

Hawkins now showed cause, and contended that it would be unjust to substitute the vendor as the defendant in the action, unless the original defendants gave security for costs.

Davison, in support of the rule. The defendants are mere stakeholders, and there is no precedent for requiring security for costs in such a case. If a stakeholder may not call upon the parties really interested in the subject matter in dispute to interplead, unless he gives security for costs, the interpleader statute will be of little benefit to him; and in actions against the sheriff, who is generally a most eligible defendant, the substitution of a less responsible defendant, without security for costs, will be constantly resisted.

[*Erle, J.* The case of a sheriff is different; he is a public officer, who is not to be made liable if he does his duty; an auctioneer is a private person, who accepts a liability as part of his trade.]

LORD CAMPBELL, C. J. The court may mould these rules according to the justice of each particular case, and it would not be just that the plaintiff should be compelled to relinquish a substantial defendant without security for costs.

COLERIDGE, WIGHTMAN, and ERLE, JJ., concurred.

Davison then applied for the costs of the interpleader rule out of the deposit money, and referred to 2 Arch. Prac., by Chitty, 1216, 1217, 8th ed., to show that it was the ordinary practice to allow such costs.

[*Coleridge, J.* Such costs are not allowed to the sheriff.]

They are allowed in other cases. The sheriff may call upon the contending parties to interplead before action brought, and he is allowed his poundage if the execution is ultimately held good.

LORD CAMPBELL, C. J. The auctioneer contracts with the purchaser to return the deposit in case the sale turns out to be void. It may be reasonable, that where a defendant has become possessed of

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property, to which there are rival claimants, without the intervention of a contract, he should have his costs out of the fund; but that is not so here.

COLERIDGE, WIGHTMAN, and ERLE, JJ., concurred.

Rule absolute to substitute the claimant as defendant, on the defendant's giving security for costs.

IN THE EXCHEQUER CHAMBER.

BONAKER v. EVANS.¹

December 3, 1850.

Clergy — Non-residence — Summons to show Cause — Monition — Order to reside — Sequestration — Right of Clergyman to be heard before Sequestration.

A writ of sequestration issued under the stat. 1 & 2 Vict. c. 106, to compel a clergyman to reside on his benefice, is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him, as it is one step towards the forfeiture of the benefice. The bishop, therefore, ought to give the clergyman an opportunity of being heard before directing the sequestration.

If, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside; but if that order be disobeyed, the bishop is not justified in directing a sequestration at once, and the sequestration will be void, unless before issuing it he gives the clergyman an opportunity of rebutting the supposed facts, or of offering lawful excuse for his disobedience to the order to reside.

Semble, that a summons to show cause should precede the issuing of the monition, as it has a penal character; and that the sequestration should recite the delinquency on account of which it is issued, and also the bishop's adjudication on the same.

ERROR from the court of queen's bench.

This was an action of debt for money had and received.

The defendant pleaded never indebted.

The action was brought to try the validity of a writ of sequestration issued by the bishop of Worcester, under which the defendant, as the appointed sequestrator, had collected and received 28*l.* 11*s.* 11*d.*, part of the profits of the plaintiff's benefice.

On the trial, before Erle, J., at Westminster, on the 2d of February, 1850, the following facts appeared in evidence: The plaintiff was the vicar of the parish of Church Honeybourne, in the county and diocese of Worcester, and for some years before the commencement of the action had resided with his family at Evesham. The plaintiff at one time had a license for non-residence, which was afterwards withdrawn. On the 5th day of November, 1846, the bishop of Worcester caused to be issued under his hand and seal, and duly served upon the plaintiff, the following monition: —

¹ 20 Law J. Rep. (n. s.) Q. B. 137.

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"Henry, by divine permission, lord bishop of Worcester, to William Baldwin Bonaker, clerk, vicar of the vicarage and parish church of Church Honeybourne, in the county and our diocese of Worcester, greeting. Whereas it appears to us that you, the said W. B. Bonaker, being a spiritual person holding a benefice, to wit, the said vicarage and parish church within our diocese, not having a license to reside elsewhere than in the house of residence belonging to your said benefice, nor having any legal cause of exemption from your residence, do not sufficiently, according to the true meaning and intent of an act of Parliament made and passed in the 2d year of the reign of her present majesty, intituled, 'An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy,' reside on your said benefice; we do, therefore, under and by virtue of the power and provisions of the said act of Parliament, admonish and require you, the said W. B. Bonaker, forthwith to proceed to, and reside on, your said benefice of Church Honeybourne, and to perform the duties thereof, and to make a return to this our monition within fifty days after the issuing of this our monition on this day issued. Given under our hand and episcopal seal, this 5th day of November, A. D., 1846, and in the 6th year of our translation."

On the 19th day of December, 1846, the plaintiff, in obedience to the monition, began to reside in the vicarage house, and on the 22d day of December, 1846, made and transmitted to the bishop the following return to the said monition:—

"To the right reverend the lord bishop of Worcester. I, William Baldwin Bonaker, vicar of Church Honeybourne, in the diocese and county of Worcester, do, by this my affidavit, solemnly declare that on Saturday, the 19th instant, I took possession of, and commenced residence in, my said damp and uncomfortable hole of a vicarage house, at Church Honeybourne aforesaid, in consequence of your monition served on me, the 6th day of November last, protesting at the same time that, under the act of Parliament, and the rural dean's certificate already filed in the register's court at Worcester, I am justly entitled to a license of non-residence. As witness my hand this 22d day of December, 1846.

"W. B. Bonaker."

On the 31st day of May, 1847, the defendant, as secretary of the bishop, wrote and sent to the plaintiff the following letter:—

"Worcester, May 31st, 1847."

"Reverend sir, — I am desired by the bishop of Worcester to send you on the other side a copy of the return which has been made to his lordship of the residence you have kept on your benefice of Church Honeybourne since the service of the monition on you to reside in November last, and to inform you that such is not a *bona fide* residence on your living as required by the act of Parliament, and that unless you immediately commence a *bona fide* residence thereon, his lordship will be under the necessity of issuing a sequestration of

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the profits of your benefice, and proceeding thereon according to the directions of the act of Parliament in that case made and provided.

"I am, reverend sir,

"Your most obedient servant,

"Charles Evans.

"The Rev. W. B. Bonaker, Church Honeybourne."

"Copy of return of the number of nights Mr. Bonaker has slept in the vicarage house of Church Honeybourne since service of the monition. 1846: December 19th, 20th, 25th, 26th, 27th. 1847: January 2d, 3d, 9th, 10th, 16th, 17th, 22d, 23d, 24th, 30th, 31st. February 6th, 7th, 13th, 20th, 21st, 27th, 28th. March 6th, 13th, 14th, 20th, 21st, 27th. April 10th, 17th, 18th, 24th, 25th. May 1st, 2d, 8th, 9th."

On the 4th day of June, 1847, the plaintiff wrote and transmitted to the defendant an answer to the foregoing letter, of which the following is an extract:—

"Sir,—In reply to your letter of the 31st ult. enclosing, by order of the bishop, a 'copy return of the number of nights Mr. Bonaker has slept in the vicarage house at Church Honeybourne since service of the monition,' I beg to say that the author is a malicious liar, and I dare him to the proof of it in the public courts."

On the 14th day of December, 1847, the bishop caused to be issued under his hand and seal, and duly served on the plaintiff, the following order to reside: "Henry, by divine permission, lord bishop of Worcester, to the Rev. W. B. Bonaker, clerk, vicar of the vicarage and parish church of Church Honeybourne, in the county of Worcester, and within our diocese and jurisdiction, greeting. Whereas, by our monition, given under our hand and episcopal seal, bearing date the 5th day of November, A. D. 1846, we did, under and by virtue of the powers and provisions of an act of Parliament, made and passed in the first and second years of the reign of her present majesty, intituled 'An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy,' monish and require you, the said W. B. Bonaker, forthwith to proceed to reside on your said benefice of Church Honeybourne, and to perform the duties thereof, and to make a return to such our monition within fifty days after the issuing of that our monition on that day issued. And whereas, the said monition was, on the 6th day of November, A. D. 1846, personally served upon you by showing the said original monition to you and leaving with you a true copy thereof, as appears by the certificate indorsed thereon, and an affidavit therewith filed. And whereas, by your affidavit or return to our said monition transmitted by you to us, bearing date the 22d day of December, 1846, you solemnly declared that you took possession of, and commenced residence in, your said vicarage house at Church Honeybourne, on Saturday, the 19th day of December, 1846, in consequence of our monition served upon you as aforesaid. And whereas it has been officially reported to us, that in obedience to such our monition, you did begin to reside upon your said benefice of Church Honey-

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bourne, on the said 19th day of December, 1846, but that since that time you have not continued to reside thereon, but have for the most part absented yourself therefrom, and that the several times of your being present at your vicarage house since the said 19th day of December, 1846, when accounted for, together have not amounted to four months in the whole. Now, we do hereby, under and by virtue of the said before-mentioned act of Parliament, order and require you, the said W. B. Bonaker, to proceed to and reside on your said benefice of Church Honeybourne, within thirty days after the service hereof upon you. Given under our hand and episcopal seal this 14th day of December, A. D. 1847, and in the seventh year of our translation."

On the 3d day of February, 1848, the bishop caused to be issued and served on the plaintiff the following writ of sequestration, under the seal of the consistory court of the diocese:—

"Joseph Phillimore, doctor of laws, vicar general in spirituals of the right rev. father in God, Henry, by divine permission, lord bishop of Worcester, and principal official of his consistory court there lawfully appointed, to our beloved in Christ, Charles Evans of the College Yard, in the city of Worcester, gentleman, greeting. Whereas the said lord bishop of Worcester did, under and by virtue of the powers and provisions of an act of Parliament made and passed in the second year of the reign of her present majesty, intituled 'An act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy,' on the 5th day of November, A. D. 1846, issue a monition under his hand and seal, dated on the day and year last aforesaid, to the Rev. W. B. Bonaker, clerk, vicar of the vicarage and of the parish church of Church Honeybourne, in the county of Worcester, and within the diocese of Worcester aforesaid, and did thereby monish and require the said W. B. Bonaker forthwith to proceed to and reside on his said benefice of Church Honeybourne, and to perform the duties thereof, and to make a return to the said monition within fifty days after the issuing of that monition. And the said monition was, on the 6th day of November, A. D. 1846, personally served on the said W. B. Bonaker, by showing the said original monition and leaving with him a true copy thereof, as appears by the certificate indorsed thereon, and an affidavit therewith filed. And whereas the said W. B. Bonaker, by his affidavit or return to the said monition transmitted by him to the said lord bishop of Worcester, bearing date the 22d day of December, 1846, solemnly declared that he took possession of, and commenced residence in, his vicarage house at Church Honeybourne, on Saturday the 19th day of December, 1846, in consequence of the said monition served upon him as aforesaid. And whereas it having been officially reported to the said lord bishop of Worcester, that, in obedience to the said monition, the said W. B. Bonaker did begin to reside upon his said benefice of Church Honeybourne on the said 19th day of December, 1846, but that since that time he had not continued to reside thereon, but had for the most part absented himself therefrom, and that the several times of his being present at his vicarage house since the said 19th day

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of December, 1846, when accounted for, together had not amounted to four months in the whole, the said lord bishop of Worcester, after the time specified in the said monition for the return thereof, to wit, on the 14th day of December, A. D. 1847, by his order under his hand and seal, bearing date the day and year last aforesaid, after reciting the said monition and the said service thereof, and the affidavit or return made thereto by the said W. B. Bonaker, and of his having begun to reside upon his said benefice of Church Honeybourne, and of his having absented himself therefrom, did under and by virtue of the before-mentioned act of Parliament, order and require the said W. B. Bonaker to proceed to and reside upon his said vicarage or benefice of Church Honeybourne within thirty days after the service thereof. And whereas, on the 16th of December, A. D. 1847, the said order was personally served upon the said W. B. Bonaker, by then showing to him the said original order, and by then leaving with him a true copy thereof, and such order has not been complied with by the said W. B. Bonaker. And whereas, by reason of the premises it is lawful for the said lord bishop to sequester the property of the said benefice until such order shall be complied with, or such sufficient reasons for non-compliance therewith as shall be deemed satisfactory by the said lord bishop of the said diocese for the time being, shall be stated and proved as in and by the same act as in that behalf mentioned and provided. And whereas the said lord bishop hath accordingly directed us to issue a sequestration, limited as aforesaid, of the said profits: we, therefore, in obedience to the directions of the said lord bishop, do by these presents sequester the property of the said benefice or vicarage of Church Honeybourne, until the order aforesaid be complied with, or such reasons as aforesaid for non-compliance therewith, be stated and proved as aforesaid, and do make and appoint you the said Charles Evans our sequestrator thereof during our pleasure; only giving and granting unto you our full power and authority to act in the sequestration, and by virtue thereof to collect, levy, ask, sue for, recover, and receive into your hands all and singular the profits whatsoever of and belonging to the said benefice or vicarage of Church Honeybourne, and to the said W. B. Bonaker as vicar thereof, in whose hands and possession any such are or may be found remaining; and the same so collected, levied, recovered, and received, to expose for sale and sell for the best price that can be had or gotten, or otherwise to make the best composition you can for the same; and by and out of the said profits to cause the cure of the said church to be duly served by a minister or ministers, to be approved of by the said lord bishop or his successors for the time being, and to cause all other duties and charges incumbent on the said church to be duly borne, performed, and satisfied. Provided, nevertheless, that you do and shall render unto the said lord bishop, or his successors for the time being, or to us or some other competent judge in this behalf, when and so often as you shall be thereunto lawfully required, a just and faithful account of all and singular the said profits, and also of your disbursements and other transactions by virtue and under the authority of this our sequestration; and such sum and sums of money as

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shall upon such account remain in your hands, (such account being first examined and allowed by the said lord bishop or his successor for the time being, or by us or some other competent judge in this behalf,) do apply or pay, or cause to be applied or paid, in such manner as the said lord bishop, or his successors for the time being, shall direct or appoint by any order or orders to be made for that purpose, and under his hand, by virtue and under the authority of the act of Parliament, and filed as thereby required. In witness whereof we have caused the seal of the said consistory court to be affixed to these presents. Dated at Worcester, the 3d of February, A. D. 1848."

Neither before the issuing of the said monition or the order to reside, or the said writ of sequestration, was any citation, order or summons to show cause why they or any of them should not issue, ever served on the plaintiff, otherwise than appears by the documents as above set forth. Nor, otherwise than as appears by the documents as above set forth, was he ever, before they respectively issued, heard in his defence, why they or any of them should not issue.

The jury, under the direction of the learned judge, returned a verdict for the defendant.

The plaintiff tendered a bill of exceptions to the ruling of his lordship, which set forth the above-mentioned facts.

The case was argued (November 27, 28) before the court of exchequer chamber,¹ by

Whitehurst, (*Greenwood* with him,) for the plaintiff. The plaintiff is entitled to a verdict if the sequestration, which issued by virtue of the stat. 1 & 2 Vict. c. 106, be void. It is submitted that the sequestration is void. In the first place, according to the first principles of justice, there ought to have been a summons to the plaintiff to show cause before the monition issued against him. For the monition is not merely in the nature of a summons, but has a penal character in some degree; for even if the party against whom it issues obeys it immediately, and goes into residence, he has, by sect. 55, to pay all the costs and expenses incident to its issuing.

Secondly, the order to reside is not warranted by the act, and therefore the sequestration is a nullity; for a sequestration, which is only to have force until the order be obeyed, cannot be valid if the order which it seeks to enforce be unavailing. An order to reside is only required in case of proceedings under sect. 54; but that section is limited to the case of a clerk who makes no return, or an unsatisfactory return, or a false return, to the monition. Here, the plaintiff made a good return, and went into residence.

The proceeding, therefore, against him must be under sect. 56, which applies to the case of a party going into residence, and then ceasing to reside. That section says, if "any spiritual person, not having a license to reside out of the limits of his benefice, nor having other lawful cause of absence from the same, who, after any such monition or

¹ Consisting of PARKE and PLATT, BB., WILLIAMS and TALFOURD, JJ., and MARTIN, B.

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order as aforesaid requiring him to reside, and before or after any such sequestration as aforesaid, shall in obedience to any such monition or order have begun to reside upon his benefice, shall afterwards and before the expiration of twelve months next after the commencement of such residence, wilfully absent himself from such benefice for the space of one month together, or to be accounted at several times, it shall be lawful for the bishop, without issuing any other monition or making any order, to sequester and apply the profits of the benefice," &c. This section says nothing about any order to reside being issued before the sequestration. Sect. 112 is perfectly consistent with sect. 56. It contemplates that the party shall have an opportunity of showing cause against the monition. Sect. 113, which requires an order to reside, applies only to cases where a party has not gone into residence, and is proceeded against under sect. 54. The third objection is, that the bishop ought to have given the plaintiff an opportunity of being heard in his defence before he directed the sequestration to issue. *Capel v. Child*, 2 Cr. & J. 558; s. c. 1 Law J. Rep. (n. s.) Exch. 205, is precisely in point. The principle is laid down in *The King v. The University of Cambridge*, 1 Str. 557. The bishop should have summoned the plaintiff, heard his defence, and adjudicated upon the merits. It is found by the case that he did not do so. Had he adjudicated upon it, after hearing the plaintiff, that the plaintiff had wilfully absented himself, it is not contended that his decision could have been impugned before the jury. *In re Bartlett*, 3 Exch. Rep. 28; s. c. 18 Law J. Rep. (n. s.) Exch. 25; also 12 Q. B. Rep. 488; s. c. 18 Law J. Rep. (n. s.) Q. B. 11. The sequestration is of a highly penal character. It issues to compel obedience. By sect. 58, if it continue in force for a year, or if two sequestrations issue in two consecutive years, the living is *ipso facto* void. The letter of the bishop's secretary, the defendant, does not give the plaintiff any opportunity of being heard in his defence or appoint any day for an inquiry. Fourthly, it is not stated on the face of the order to reside or of the sequestration that the plaintiff *wilfully* absented himself. He may have had lawful cause of absence. Sickness, confinement in prison, a license of non-residence, an appointment as chaplain to the queen, may have been the cause of his absence from his living. The sequestration does not show that the bishop had jurisdiction. Fifthly, before the sequestration issued, the bishop ought to have issued an order for the sequestration. This order is made requisite both by sects. 54 and 56. An appeal is by those sections given to the archbishop, not against the sequestration, but against the order for the sequestration.

[*Parke, B.* Is not the order for the sequestration the same thing as the sequestration?]

It is submitted that it is not; and that the sequestration itself shows that there was an order of the bishop independent of it.

[The court here intimated that they should like to hear the other side on the point of the necessity of the bishop's giving the plaintiff an opportunity of being heard in his defence before the issuing of the sequestration.]

Sir F. Thesiger, (*Sumner* with him.) These proceedings are not of

a penal character. They are rather in the nature of a *distringas* to compel residence than of a punishment. The principle of law, that a party ought to have an opportunity of being heard in his defence in judicial proceedings against him, never was intended to apply to a case like the present. There are penal provisions for non-residence contained in sect. 32 of the statute. Proceedings may be taken under sect. 54 (which was inserted for the benefit of the clergyman) in lieu of the penal proceedings under sect. 32.

Secondly, the statute expressly permits the bishop to issue these proceedings without giving the party any further summons or hearing than was here given. It was not necessary that the bishop should hear the party on this point. The statute contemplates that the bishop should be acquainted with the fact of the residence or non-residence of his clergy. By sect. 52, the bishop is empowered and required to put questions to every incumbent as to the fact of his residence, and the circumstances connected with it, and the clergyman is bound to answer them. A clergyman, therefore, cannot be non-resident without the bishop knowing the fact and the cause, and whether it were justifiable or not. It is not to be supposed that the bishop would issue the monition without good cause. The act of Parliament clearly intends that the monition is to be the first step in the proceedings. No previous summons is necessary. The case of *Capel v. Child*, which has been relied upon, is not in point. If there had been any proceeding by which the requisition of the bishop in that case could have been got rid of, the decision would have been different. Here, the monition and sequestration could have been got rid of by obedience. The greatest doubt has been thrown upon *Capel v. Child* in the case of *The Hammersmith Rent Charge*, 19 Law J. Rep. (N. S.) Exch. 66. [Platt, B. The monition may be got rid of, but the costs of it cannot be got rid of.]

Sect. 55 only imposes costs if the clergyman is non-resident. If he was resident, the section does not apply, and there would be no costs. Sect. 113 does not take away any power given to the bishop by sect. 56. The bishop has done more than he need. He need not have issued the order to reside; but he was fully warranted in issuing it. It cannot vitiate the sequestration in any way. The bishop had a discretion in the matter. It is for the benefit of the clergyman that the order to reside should be issued. Besides, the plaintiff had an opportunity offered him of being heard. The letter addressed to him by the bishop's secretary gave him ample opportunity, and stated the charge against him. In answer to that, he sent a letter saying that the informant was a malicious liar, thus evading the question. He does not assert that he was resident, or deny the truth of the assertions of the secretary's letter, or allege any excuse for non-residence. The bishop had to judge of the letter and its effect.

[Parke, B. If the bishop chose to issue an order to reside, ought he not to have ascertained whether the order was obeyed, or whether the party had any lawful excuse for want of obedience before issuing the sequestration?]

The bishop might satisfy himself of the fact of residence, and com-

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pliance with the order without any hearing. If there is any error in issuing the sequestration, the clerk may appeal to the archbishop, who will correct it, (for the appeal given against the order of sequestration clearly means an appeal against the writ of sequestration,) and if the party has been resident he has no costs to pay. The bishop may, under sect. 54, in certain cases, even return the profits which have been sequestrated.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. This was a case which was tried before Mr. Justice Erle, who, however, expressed no decided opinion upon it, for it was put into the shape of a bill of exceptions, in order that it might come before the court upon a writ of error. It was an action brought by the plaintiff for money had and received to the use of the defendant, as the bishop's secretary, and the facts are set out in the bill of exceptions, a part of which it will be necessary for me shortly to state. [His lordship then stated the principal facts of the case, as set out in the bill of exceptions.] It was conceded on both sides that it had been correctly held, in *Re Bartlett*, that the bishop was the proper authority to decide whether there had been a non-compliance with the order to reside under the 54th section of the 1 & 2 Vict. c. 106; and the same may be said of the wilful absence of the incumbent for a month, under the 56th section; for although, according to the letter of both sections, the fact itself of disobedience or absence is apparently made a condition precedent to the power of sequestration, it is clear from the context that the adjudication of the fact by the bishop is all that is required, and that the jurisdiction to determine it is meant to be given to the bishop.

If, then, the bishop decides in due course that either event has happened, I apprehend that the truth of the fact so determined never can be matter for inquiry before a jury. The bishop, then, acting judicially in this respect, the main question for our consideration is, whether the sequestration ordered by him is a proceeding simply in the nature of a distress to compel residence, or altogether, or even in part, *in pœnam* for previous non-residence or absence. If it be the latter, then the bishop ought to have given the incumbent an opportunity of being heard before it was issued, for no proposition can be more clearly established than that a man cannot incur the loss of his liberty or property for an offence, by a judicial proceeding, until he has had a fair opportunity of being heard before it was issued; unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary. This is laid down in *Bagg's Case*, 11 Rep. 99, and in *The King v. The Chancellor of the University of Cambridge*; *The King v. Benn*, 6 Term Rep. 198, and *The King v. Gaskin*, 8 Term Rep. 209, and in many other cases; and more particularly in that of *Capel v. Child*, in which Mr. Baron Bayley says, "I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his prop-

erty without an opportunity of being heard in his defence." That case is a very strong one, as it shows how firmly the court adhered to that great principle of justice that in every judicial proceeding "*Qui statuit aliquid parte inaudita altera æquum licet statuerit haud æquus fuit.*" Now, we all think that although one of the objects of the proceeding by sequestration may be to enforce future residence, another clearly is to punish past delinquency; and though it is partly in the nature of a distress, it is also in the nature of a penalty. The sequestration operates as a forfeiture of part of the profits of the living, for they are first to be applied (under sect. 54) to the expenses of serving the cure, and afterwards towards the expenses of the monition and sequestration, and however short the time the sequestration is to continue, these are to be paid. But a more important consequence is, that, by sect. 58, if the sequestration continues for a year, the benefice is void; if two sequestrations are incurred in the space of two years, it is also void. The first sequestration, therefore, is one step towards the loss of the living, and certainly it must be treated as penal. We, therefore, feel no difficulty in deciding that before the issuing of the sequestration the incumbent ought to have had an opportunity afforded him of rebutting the implied charge of disobedience to the monition in the one case, and of wilful absence in the other, or of offering a lawful excuse for either; unless the act of Parliament shows the intention of the legislature to be that the bishop should act in such a proceeding *ex parte* without hearing the person to be punished. It does not appear to us that any clauses in this act of Parliament (the 1 & 2 Vict. c. 106) raise any inference that the legislature meant to authorize the bishop to depart from the usual course of justice, and to proceed *ex parte*, or it would have done so in express terms. The power to ask annual questions, not *pro re nata*, mentioned in the schedule, is for the double purpose of affording the bishop information, and also of affording better security for the performance of the duties of the clergy, and cannot dispense with this necessary requisite for the due administration of justice; and there is no other that seems to raise the inference that such was the intention of the legislature. The act of Parliament in question in the case of *Capel v. Child*, namely, the 57 Geo. 3, c. 99, s. 50, which authorized the bishop to proceed "either of his own knowledge or upon proof by affidavit," afforded a very strong argument in favor of such an intention, yet it did not prevail. There is no part of this act which leads to any thing like so strong an inference of an intent to dispense with this great principle of justice that a man is not to be condemned unheard. But, then, it is contended that prior to the issuing of the sequestration the incumbent had that sufficient opportunity which the law requires, and that the letter of the defendant, as the bishop's secretary, ought to be considered as affording him an ample opportunity of being heard in his defence. We do not mean to say that the bishop was bound to proceed to hear the charge with the same formalities as are adopted in proceedings before the courts, or that a greater degree of form was requisite than is sufficient to justify a superior in removing an inferior officer for delinquency; a

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rector, for instance, before he removes a parish clerk. But it is essential that the charge should be intimated to the supposed delinquent, and that he should have a fair opportunity of rebutting it. Does, then, the letter in question answer this description? We think not. It does not purport to call on the plaintiff to deny or excuse his wilful absence or his disobedience to the monition before or to the bishop, or inform him that, if he does not, a sequestration would issue. It is written only to threaten him that the sequestration will issue unless he proceed to reside. We do not think that this amounts to that hearing to which the party accused is entitled, and which the law requires. Besides, if it did, the sequestration did not issue on an adjudication by the bishop under the 56th section, that the plaintiff had been guilty of *wilful* absence, for the bishop issued an order to reside, and afterwards sequestered the profits of the living for disobedience to that order.

We do not say that the proceeding by order to reside which did not come within the terms of the 56th section was an illegal order; indeed, we think that this measure was clearly dictated by the bishop's desire not to act harshly towards the plaintiff; so, also, we think his lordship was authorized to adopt it by law. The act of Parliament is far from being accurately or clearly worded; but we think the bishop was justified in issuing the order, and, in this respect, acted with perfect propriety.

But, then, when the order was issued and disobeyed, the bishop should not have proceeded to punish the disobedience by sequestering without giving the vicar (the plaintiff in this case) a fair opportunity of being heard; and the omission to do so, in our opinion, renders the subsequent sequestration void. This order to reside, in fact, only extended the time for the incumbent's residence, and gave him a *locus penitentiae*. On the ground, then, that this sequestration was void for the reasons before given, we think the plaintiff was entitled to recover.

It is, therefore, unnecessary for us to decide whether the form of the instrument of sequestration was sufficient, and we should not do so without hearing the argument of the defendant's counsel on that point. But it will not be improper for us to suggest, that in acting under this statute it would be advisable for the bishop's officers to take care for the future that the instrument of sequestration recites the delinquency in respect of which it issues, and the bishop's adjudication upon it; and further, as a measure of precaution, which may prevent objection hereafter, that the monition be preceded by a notification to the incumbent of the charge against him in the nature of a summons, to show cause, for even the monition has a penal character, as the incumbent is, by sect. 55, bound to pay the costs of it at all events, and the bishop acts judicially in issuing it under sect. 56. Therefore, the judgment must be reversed, and a writ of *venire de novo* awarded.

Judgment reversed.

Overseers of Holbeck, Appellants, v. The Overseers of Leeds, Respondents.

THE OVERSEERS OF HOLBECK, Appellants, v. REGINA, on the Prosecution of THE OVERSEERS OF LEEDS,¹ Respondents.

January 31, 1851.

Order of Removal—9 & 10 Vict. c. 66—Imprisonment—Interruption.

The absence of a person from a parish in which he is residing, in consequence of an imprisonment out of the parish, is not of itself such an interruption of the residence as would prevent his becoming irremovable by five years' residence including the time of the imprisonment, if an intention to return at the expiration of the imprisonment exists throughout it.

Therefore, where a pauper had resided for five years in the respondent parish, and during that time had been imprisoned in an adjoining parish for seven days under a conviction in default of paying a fine, and had afterwards returned to his residence, it was held, that he was irremovable under the 9 & 10 Vict. c. 66, s. 1.

THIS was a special case stated, under the 12 & 13 Vict. c. 45, s. 11, by consent of the above parties, and by order of one of the judges of the superior courts. The case stated the following facts: On the 2d of April, 1850, an order was made by two justices of the borough of Leeds for the removal of John Rhodes from the township of Leeds to the township of Holbeck, both in the said borough of Leeds. The appellants admit the settlement to be in their township, and the respondents admit that the pauper had resided six years in their township previous to taking out the order, and was irremovable therefrom, unless committal to prison and imprisonment therein, as hereinafter mentioned, interrupts the residence, and creates removability. On the 4th of December, 1848, the pauper was convicted by two justices of the said borough for an assault, and was adjudged to pay a penalty of 5s., and 8s. for costs, and in default of payment was ordered to be committed to the house of correction of the said borough for seven days, "unless the said several sums should be sooner paid." The pauper did not pay the penalty and costs, or either of them, and was therefore sent to the house of correction, which is not in the township of Leeds, but in another township, and he was confined there for seven days. On the 5th of September, 1849, the pauper was again convicted under the Leeds improvement act, for being drunk, and he was ordered to pay a penalty of 5s., and 5s. further for costs; and in default of immediate payment of the said penalty and costs, he was to be imprisoned for three days. Not paying, he was committed to the said house of correction, and served the three days therein as a prisoner. [The two convictions were then set out in the case.] The appellants and respondents apply to this court for its decision upon these facts, and engage to carry out the same as provided by the 12 & 13 Vict. c. 45, s. 11. Each township consents to pay its own costs.

Pashley, in support of the order.² The imprisonment having taken

¹ 20 Law J. Rep. (N. S.) M. C. 107.

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place in a prison out of the removing township under a legal commitment, constitutes a break in the residence, and renders the pauper removable. In *The Queen v. Halifax*, 12 Q. B. Rep. 111; s. c. 17 Law J. Rep. (n. s.) M. C. 158, it was held, that to make a constructive residence in a parish there must be not only an *animus revertendi*, but also a legal right to return. In *The Queen v. Salford*, Ibid. 106; s. c. 17 Law J. Rep. (n. s.) M. C. 170, the pauper was imprisoned for a misdemeanor in a prison out of the removing township, and it was held that this prevented the five years' residence from being complete. *The Queen v. Pott Shrigley*, Ibid. 143; s. c. 18 Law J. Rep. (n. s.) M. C. 33, is to the same effect, except that there the imprisonment ended in transportation of the pauper. It seems, therefore, to be decided that an imprisonment, at all events for a criminal offence, is a break of residence.

[*Lord Campbell*, C. J. Would it make any difference, if the committal were on a charge which is afterwards dismissed?]

Any absolute legal order by which the pauper is compelled to go, and his right to return is taken away, is sufficient to render it a break. It is immaterial whether the actual absence be for a shorter or a longer period, if it interferes with the pauper's right to return. *The Queen v. Seend*, Ibid. 133; s. c. 18 Law J. Rep. (n. s.) M. C. 12.

[*Lord Campbell*, C. J. Under these convictions, the pauper would not be detained after he offered to pay the fine and costs.]

Still he remains in prison under a compulsory process, and the former right of removing him is restored to the parish.

[*Lord Campbell*, C. J. To hold this, might encourage frivolous charges, involving a single night's imprisonment.]

If fraud were found, it would destroy the effect of the imprisonment. But it is difficult to see where the line should be drawn between committals which do, and committals which do not, interrupt residence. Perhaps the safest rule would be to hold that all committals in execution, as distinguished from those merely for safe custody, made a break in the residence; in which case, a conviction, if quashed on appeal, would not deprive the party of his right, according to *The King v. Great Salkeld*, 6 M. & S. 408.

[*Lord Campbell*, C. J., referred to the cases where a service has been held to be not affected by the imprisonment of the servant. *The King v. Barton-upon-Irwell*, 2 M. & S. 329. *The King v. Hallow*, 2 B. & C. 739.]

There it was held, that there had been a dispensation by the master. If the master did not consent, it was a dissolution of the service.

Pickering and *Hardy*, contra. It is admitted in the case that there has been a residence for more than five years, and that the pauper is irremovable, unless the imprisonment necessarily interrupted the residence; therefore an *animus revertendi* in the pauper must be taken to have existed. Now, this imprisonment was one which might have been put an end to at any moment by paying the fine and costs, and

him, and the case came on upon a *concilium*; but the court held, that the respondents, who sought to enforce the order, ought to begin in a special case stated under this statute.

Overseers of Holbeck, Appellants, v. The Overseers of Leeds, Respondents.

if such an absence be held to constitute a break of residence, it will go far to nullify the stat. 9 & 10 Vict. c. 66. In *The Queen v. Pott Shrigley*, the pauper was transported, and the long imprisonment for felony there was very different from what has here occurred, where the detainer is only conditional and for a minor offence, involving no loss of civil rights. In *The Queen v. Salford*, no doubt, the imprisonment was for a misdemeanor and not for a felony, but no point seems to have been there raised as to that. The argument of the respondents is, that any taking up of a person to a justice out of the township is a break, however short the absence may be.

[*Coleridge, J.* If the prisoner does not pay the fine and get himself liberated, is not that evidence to negative an *animus revertendi* ?]

It indicates that his poverty, but not his will, consents to the change of residence. An order of removal is different, for the sole object of executing that is to remove the pauper who has wrongfully intruded into the parish, and there the removal, *ipso facto*, puts an end to the residence. *The Queen v. Halifax*.

Pashley replied.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. In this case it is admitted that the pauper has resided for the five years, so as to be irremovable, unless an interruption in such residence had been created by imprisonment. We assume, therefore, that he had a dwelling or a place of residence in the respondent parish, together with the intention of returning thereto as soon as the term of the imprisonment expired; and the question of interruption is thus raised.

Upon the argument it was contended, that absence under an imprisonment in execution would create an interruption, because the power of returning would be taken away by law during such imprisonment, though it was not supposed that absence alone would produce that effect. But we find no good reason and no analogy to support this position, while the danger of endeavoring to defeat the right by means of imprisonment affords a reason against it; nor is there any thing in the statute tending to define the meaning to be attached to the term "residence," which is capable of being applied to various combinations of facts; neither is there any authority for it. The decisions in respect of orders of removal stand upon the nature of that proceeding, which was created for the purpose of breaking the continuity of inhabiting for forty days, and it ought to have the same effect in respect of five years as of forty days. The judgments in *The Queen v. Salford*, and *The Queen v. Pott Shrigley*, at first give the impression that imprisonment would be a break in the residence; but if the points presented for decision are considered, it will appear that no such rule was laid down. In *The Queen v. Pott Shrigley*, the pauper's husband was sentenced to be transported before the order in question for the removal of the pauper was made. Under these circumstances, it was contended, that the residence of the wife,

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after the transportation of the husband, united with her former residence with him, rendered her irremovable; but as a wife is not irremovable unless her husband if present would be so, this was decided in the negative, and the case has no bearing on the question of interruption of residence, further than that it is assumed throughout that the transportation is an interruption. In *The Queen v. Salford*, the main question was, whether the time of imprisonment during the five years preceding the order was to be excluded from computation for all purposes, where the place of imprisonment was out of the parish; and no point was made in respect of domicile or intention to return. The court decided, that, unless there were five years' residence, the question of exclusion of time of imprisonment by force of the prisoner did not arise. It was not argued that the residence continued unbroken during the time of the imprisonment stated in that case. If that point had been established, the proviso would have been inapplicable; but assuming the residence to have been broken when the imprisonment occurred, the application of the proviso became essential. The question of interruption was not discussed, but the decision assumed the interruption to be admitted.

The point, therefore, now presented was not decided in these cases, and as the operation of the statute would be much restricted if we held the irremovability to be destroyed by every imprisonment, we have come to the conclusion against the respondents upon the facts here stated.

*Order to be quashed.*¹

REGINA, on the Prosecution of THE OVERSEERS OF SNAITH, Appellants, v. THE OVERSEERS OF WIGTON,² Respondents.

January 27, 1851.

Lunatic Pauper — Expenses of, when irremovable under 9 & 10 Vict. c. 66 — 12 & 13 Vict. c. 103, s. 5.

The 12 & 13 Vict. c. 103, s. 5, provides, that all the costs, &c., incurred or thereafter to be incurred, in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed under any order to any asylum, &c., and who if not a lunatic would have been exempt from removal by

¹ In accordance with the principle adopted in this case, it has been frequently held in this country, that a person's "residence," in order to effect the question of his settlement under the poor laws, must have been the result of choice, and not of legal coercion.

Accordingly, the time during which a person is confined by law in close jail, is not to be computed to give a pauper a residence in the town where such jail is situated, or to interrupt his settlement in the town from whence he came. *Danville*

² 20 Law J. Rep. (N. S.) M. C. 110. 15 Jan. 246.

v. *Putney*, 6 Vermont, 512. *Manchester v. Rupert*, Idem. 201. *Grant v. Dalliber*, 11 Connecticut, 234. And the same rule has been applied when the pauper, having been committed to jail on civil process, gave a jail bond, and was admitted to the liberties of the prison, and then removed his family and continued to reside there several years, supporting his family and paying taxes, but committing no breach of his bond. *Woodstock v. Hartland*, 21 Vermont, 563.

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reason of the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when he was so removed to such asylum:—

Held, that these words must be read to include the expenses of maintenance, as well as those of obtaining the order of removal to the asylum, both of which were, under the circumstances specified, to be borne by the union comprising the removing parish.

ON appeal against an order made by two justices, on the 12th of June, 1850, adjudicating the settlement of James Bowman, a lunatic, to be in the parish of Wigton, in the county of Cumberland; and also ordering the overseers of the poor of the said parish of Wigton to pay to the treasurer of the Goole Union the sum of 1*l.* 19*s.* 5*d.*, “for all expenses incurred and paid by, and on behalf of, the overseers of the poor of the township of Snaith, situate within the said union, in and about his examination and conveyance to an asylum;” and also the sum of 18*l.* 17*s.* 3*d.* for expenses which had been incurred and paid by the said overseers of the poor of the township of Snaith, “for the lodging, maintenance, medicine, clothing, and care of the said lunatic in such asylum;” and also ordering the overseers of the said township of Wigton to pay weekly from the date thereof, to the treasurer of the said asylum, such sums as were then and might from time to time be ascertained to be the reasonable charges of and for the future lodging, maintenance, medicine, clothing, and care of the lunatic in the said asylum, so long as he might continue a lunatic and be confined in the said asylum, or until the overseers of the poor of the township of Wigton should be duly discharged or otherwise relieved therefrom. By consent of the parties, and by order of a judge of the queen’s bench, the following case was stated for the opinion of the queen’s bench, under 12 & 13 Vict. c. 45, s. 11:—

The pauper, James Bowman, being a lunatic and chargeable to the township of Snaith, was duly removed therefrom to, and at the time of making the order was confined in, the pauper lunatic asylum situate at Wakefield, in the West Riding of York, (that being the pauper lunatic asylum in and for the said West Riding,) at the cost and charge of the said township of Snaith. When the application for the above order was made, the said township of Snaith was and still is part of the Goole Poor Law Union, in the West Riding of Yorkshire, and the said James Bowman had resided for five years and upwards in the said township of Snaith, so that if the said James Bowman had not then been a lunatic he would have been exempt from removal by reason of the provisions of the 9 & 10 Vict. c. 66, although, at the time of such application, the settlement of the said James Bowman was in the said township of Wigton.

The overseers of the poor of the said township of Snaith have abandoned the said order so far as regards the sum of 1*l.* 19*s.* 5*d.*, the expenses and moneys therein alleged to have been incurred and paid by and on behalf of the said township of Snaith, in and about the examination of the said James Bowman, and conveying him to the said asylum; and the overseers of the poor of the said township of Wigton have consented to waive all other grounds of appeal and to rely on the following ground, namely, that the said James Bowman,

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if not a lunatic, would, at the time of the making of the said order, have been exempt from removal from the said township of Snaith to the said township of Wigton, by reason of a provision of the 9 & 10 Vict. c. 66, because he, the said James Bowman, had resided in the said township of Snaith for five years next before the application of the said order, within the true intent and meaning of the said statute, and that, therefore, inasmuch as the said James Bowman, if not a lunatic, would have been so exempt from removal as aforesaid, the sum of 18*l.* 17*s.* 3*d.*, and the future lodging, maintenance, medicine, clothing, and care of the said James Bowman, in the said asylum, included in the said order, and required to be paid under it, ought, in pursuance of the 12 & 13 Vict. c. 103, to be borne by the common fund of the said Goole poor law union, in the said West Riding, in which union is comprised the said township of Snaith as appears by the said order, and in which said township of Snaith the said lunatic pauper, James Bowman, was resident when removed to the lunatic asylum for the said West Riding, as in the said order now appealed against is mentioned, and that, therefore, the said order ought not in these respects to have been granted, and that the same ought on appeal to be quashed. The respondents admit the above facts included in these grounds of appeal, and contend that they, the respondents, are entitled to obtain and enforce in respect of the said sum of 18*l.* 17*s.* 3*d.* and the future maintenance in the asylum of the said James Bowman, the order now appealed against, notwithstanding the provisions of the statute referred to.

If the court of queen's bench should be of opinion that the said order is valid, and should be confirmed in the particulars submitted, then judgment confirming the same was to be entered at the sessions accordingly; and if the court should be of opinion that the said order in the particulars submitted was invalid, then judgment, quashing the same wholly, was to be entered at the sessions accordingly.

Overend, in support of the order.¹ The order is valid. The 11 & 12 Vict. c. 110, s. 3, which charges the common fund of the union comprising the parish in which a pauper is resident with the payment of the expenses incurred in his relief, applies only to those persons who have become irremovable under the 9 & 10 Vict. c. 66, s. 1. But that statute was not designed to include the case of lunatics. In *The Queen v. Leaden Roothing*, 12 Q. B. Rep. 181; s. c. 18 Law J. Rep. (n. s.) M. C. 187, it was held, that an order might be made under the 8 & 9 Vict. c. 126, s. 58, 62, adjudging a pauper lunatic to be settled in a parish other than that in which he had previously resided for five years. Admitting, however, that it does include pauper lunatics, then its operation is prevented in the present instance by the fact of the lunatic's removal to an asylum out of the township of Snaith. *The Queen v. Salford*, Ibid. 106; s. c. 17 Law J. Rep. (n. s.) M. C. 170. Nor is the case affected by the 12 & 13 Vict. c. 103, s. 5. That relates

¹ January 25, before LORD CAMPBELL, C. J., PATTESON, COLERIDGE, and WIGHTMAN, JJ.

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merely to the expenses incurred in and about the examination and obtaining the order of removal, the claim for which has been abandoned. It is also not retrospective.

Pashley, contra. The order is bad. In the construction of an act of Parliament, the proper principle to follow is not to adhere strictly to the language employed, but to give to each passage the most liberal meaning it can bear. *Halsey v. Hales*, 7 Term Rep. 194. Adopting this rule here, it is evident that the 12 & 13 Vict. c. 103, s. 5, must be considered to refer as well to the expenses incurred by the maintenance of a pauper lunatic in an asylum, as to the costs of obtaining an order for his removal thither. The words, "in and about obtaining an order for the removal and maintenance," should be read as if they had been "in and about obtaining an order for the removal and in and about the maintenance." The Goole Union, therefore, was bound to pay the expenses, not only of conveying, but of maintaining, the pauper in the asylum. He also referred to *The Queen v. Barnsley*, 12 Q. B. Rep. 193; s. c. 18 Law J. Rep. (N. S.) M. C. 170; the 11 & 12 Vict. c. 110, s. 3, 4; and 8 & 9 Vict. c. 126, s. 48, 49, 62.¹

Overend replied.

Cur. adv. vult.

Judgment was now delivered by

¹ The following are the sections of the acts referred to:—

9 & 10 Vict. c. 66, s. 1, enacts, "That from and after the passing of that act, no person shall be removed nor any warrant granted for the removal of any such person from any parish in which such person shall have resided for five years next before the application for the warrant; provided always, that the time during which such person shall have been a prisoner, in prison, &c., or shall be confined in a lunatic asylum or house duly registered for the relief of the poor, &c., shall for all purposes be excluded in the computation of time hereinbefore mentioned; and that the removal of a pauper lunatic to a lunatic asylum under the provisions of any act relating to the maintenance and care of pauper lunatics shall not be deemed a removal within the meaning of the act."

11 & 12 Vict. c. 110, s. 3, enacts, "That after the 30th of September next, until the 30th day of September, 1849, all the costs incurred in the relief as well medical as otherwise, of any poor person who, not being settled in the parish where he resides, shall by reason of some provision of the 9 & 10 Vict. c. 66, be or become exempted from the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any such union as aforesaid, be charged to the common fund of such union, so long as such person shall continue exempted; and the expenses of the burial of any such person so exempted at the time of his death shall, if legally payable by the guardians of the union, likewise be charged to the common fund."

12 & 13 Vict. c. 103, s. 5, enacts, "That all the costs, &c., incurred, or thereafter to be incurred, in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been or shall be removed under any such order to any asylum, &c., and who, if not a lunatic, would have been exempt from removal by reason of some provision in the 9 & 10 Vict. c. 66, shall, until the time when the provisions hereinbefore contained shall cease, be borne by the common fund of the union comprising the parish wherein such pauper lunatic was resident at the time when such pauper lunatic was so removed to such asylum, &c., notwithstanding the order for the payment thereof shall have been made upon the overseers of such parish or the parish of the settlement or upon the treasurer or guardians of the union in which either parish shall be comprised."

Regina v. The Inhabitants of St. Marylebone.

LORD CAMPBELL, C. J. This case appears to turn entirely upon the construction of the 5th section of the 12 & 13 Vict. c. 103. Before the passing of that statute, the order would have been good for the whole. The respondents allow that it cannot now be supported for the expenses incurred in and about the examination of the lunatic and conveying him to the asylum, which are clearly cast upon the union of Goole; and the question is, whether the expenses of the maintenance of the lunatic are included in this enactment, or remain a charge upon the parish in which the lunatic is settled. However strange it might seem that the legislature should transfer the comparatively trifling expenses incurred in and about the obtaining of the order to the union in which the removing parish is situate, allowing the heavy burden of maintenance to remain where it was, and although we might conjecture that the omission was an oversight in the framer of the act, of course we could only give effect to the intention which we find expressed in the language employed. But, although this language is by no means happily chosen, we think it may fairly mean that the expenses of the maintenance of the lunatic should be transferred to the union. "In and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper," may be understood as if "in and about the" were again inserted between "and" and "maintenance," so as to comprehend the expenses of the maintenance as well as the expenses of the order of removal. Looking to the whole purview of this statute and of the other statutes *in pari materia*, we think that this must be taken to be the meaning of the legislature, so that the order is wholly invalid, and must be quashed.

Order to be quashed.

REGINA v. THE INHABITANTS OF ST. MARYLEBONE.¹

January 25, 1851.

Order of Removal — Removability — Wife, Desertion of — Maiden Settlement.

A married woman, whose husband was a Scotchman, and had acquired no settlement in England, had, during the absence of her husband, (who had sailed on a voyage to Calcutta without leaving sufficient means of support for his family,) become chargeable to the parish in which she was residing. The wife had acquired a maiden settlement in England:—

Held, that this was such an absence on the part of the husband as amounted to a desertion of his wife, and that she might, therefore, be removed to the place of her maiden settlement.

UPON an appeal against the order of Edward Yardley, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Thames police court, at, &c., within the metropolitan police district, for the removal of Ann Sellers and her lawful child from the parish

¹ 20 Law J. Rep. (N. S.) M. C. 61. 15 Jur. 245.

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of St. George, in the county of Middlesex to the parish of St. Marylebone in the same county, the sessions confirmed the order, subject to the opinion of the court of queen's bench on the following case : —

For three years and upwards previous to the application for the order of removal, the pauper, Ann Sellers, with her husband, William Sellers, resided in the parish of St. George. The pauper's husband, William Sellers, is a seaman, and in the course of his occupation had gone several voyages, at the termination of which he had always returned to and resided with his wife. In the month of September, 1848, he engaged himself in his ordinary occupation as a sailor, for a voyage to Calcutta and back, in the merchant ship the Queen, and immediately afterwards, in or about the same month of September, proceeded on his voyage. Previous to his so sailing, he made an arrangement with the owners of the said ship the Queen, whereby they were to pay to his wife, (with whom the said child of the said Ann Sellers and her said husband remained for maintenance and care,) during his voyage, the sum of 1*l.* 5*s.* per month, being a moiety of his pay, and which sum was duly received by her from time to time. William Sellers is a native of Scotland, and has never done any act whereby to gain or acquire a legal settlement in England. Ann Sellers having become chargeable with her child (which is an idiot) to the parish of St. George, and her husband not having returned to England, an order was applied for and made on the 20th day of April, 1849, (whilst her husband was so absent from her as aforesaid,) for the removal of herself and child to the parish of St. Marylebone, as the place of her maiden settlement, she, the said Ann Sellers, having, previous to her marriage with the said William Sellers, acquired a maiden settlement there by a hiring and service for a year. After the order was made, namely, about the 20th of June, in 1849, the said ship, the Queen, in which the pauper's husband had sailed, arrived at London, and the pauper's husband having completed his voyage, immediately returned to where his wife and child were living, in the said parish of St. George, and continued to reside there with them for about two months, at the expiration of which time the said ship, the Queen, again sailed for Calcutta and back, and the pauper's husband sailed on board her as before, having first made similar arrangements for the payment of part of his wages to his wife, whilst he was on this voyage, and the sum of 1*l.* 5*s.* was duly paid her.

If the court of queen's bench should be of opinion on the above facts that the pauper, Ann Sellers, was, at the date of the said order, removable on her maiden settlement to the parish of St. Marylebone, then the order of sessions to be affirmed, otherwise the order of sessions to be quashed.

Pashley, in support of the order of sessions, was stopped by the court, who called on

Huddleston, contra. The order contravenes the spirit of the poor

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law, the object of which was to prevent the separation of a husband from his family. If the removal be permitted, great hardship may be entailed on the husband, who is abroad in the performance of his ordinary duties, and who on his return may be deprived of the society of his wife, to which he is entitled. No authority can be adduced to support the position that a wife may be transferred to the place of her maiden settlement, while actually or constructively residing with and under the control of her husband. The settlement is suspended during his life, and can only be revived by a desertion on his part. *The King v. St. Botolph*, Burr. S. C. 367, will probably be relied on by the other side. But that decision was founded on the authority of four cases, all of which are distinguishable from the present. In *St. Giles v. Margaret's*, Burn's Justice, vol. 4, p. 457, and *The King v. Chiddingstone*, 4 Ibid. 459, the husband was dead. In *Uphottery v. Dunkswell*, Ibid. 457, the order was quashed, on the ground that it did not show that the husband was not alive, and in *Dunsfold v. Wilsborough Green*, Foley, 249, there had been an abandonment by the husband. Nor will the quitting of his wife by a husband for a short period be considered as equivalent to a desertion. In *The Queen v. All Saints, Derby*, 19 Law J. Rep. (N. S.) M. C. 14, desertion was defined to be an entire separation, and not a temporary absence. In *The Queen v. Slogumber*, 9 Ad. & E. 622; s. c. 8 Law J. Rep. (N. S.) M. C. 20, the court, acting on this principle, refused to sanction the removal of a woman whose husband was undergoing imprisonment for a limited period in a jail situated in the parish where she was living. Here, the husband had left his wife merely to follow his usual business; he had a clear intention of returning, and his wife was during the time under his control. But, further, the order, if confirmed, will become conclusive evidence of the settlement of the husband as well as of the wife. *The King v. Woodchester*, Burr. S. C. 191. *The King v. Hincksworth*, Dougl. 46, n.

LORD CAMPBELL, C. J. I am of opinion that the order of sessions is perfectly valid, and must be confirmed. What was the state of things on the 20th of April, 1849, when it was made? Ann Sellers, a married woman, was residing with her child in the parish of St. George, and had become chargeable thereto. *Prima facie*, therefore, she was liable to be removed. Her husband had, in the course of the preceding September, sailed for Calcutta without leaving adequate means of support for his family, and was at the time absent on the high seas. Under these circumstances, can it reasonably be contended that she could not be removed? Had her husband possessed a place of settlement, she might unquestionably have been sent there: he had none; but she had acquired one previous to her marriage by a hiring and service in Marylebone. It is contended that this maiden settlement remains suspended during the husband's life, or, at all events, until a separation has taken place, and that none has occurred. It does not, however, continue entirely suspended during his life, since if he deserts her it will revive. Then, does the fact of his going to a distant part of the world and leaving her chargeable amount to

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a desertion? I think that it does, and that she was, therefore, properly removed to her maiden settlement. Much has been said of the hardship which may result to the husband from the adoption of the course we are pursuing; but I cannot see that there is greater cruelty or hardship in sending the wife to her own settlement than there would have been in sending her to his if he had had one, since he might on his return enjoy her society as well in the one place as the other.

PATTESON, J. I entirely agree. The only question that we have to decide is, whether the absence of the husband was such as to amount to a desertion, and thus justify the removal of the wife to her maiden settlement. I consider that it was. With respect to the objection, that the confirmation of the order would be hereafter conclusive as to the settlement of the husband, I think that it cannot be sustained, for, as stated by Bayley, J., in *The King v. Cottingham*, 7 B. & C. 615, during his absence the family will be maintained by the parish which is bound to maintain them, and on his return, it may pass him and his family to Scotland.

COLERIDGE and WIGHTMAN, JJ., concurred.

Order of sessions confirmed.

REGINA v. THE CHAPEL-WARDENS OF BILSTON.¹

November 20, 1850.

Mandamus to Chapel-wardens — Money borrowed — Enlarging of Chapel — Consent of Vestry — Repayment out of Rates — Township not a distinct Parish — 58 Geo. 3, c. 45.

The township of B. formed part of the parish of W., but it maintained its own poor, and from time immemorial it had chapel-wardens and a chapel, in which divine service and the sacraments of the church had been performed. In 1727, for the first time, a separate burial ground for the township was consecrated, in which the rite of burial had since regularly taken place. The repairs of the chapel had always been defrayed by rates raised within the township; and the vestry books of B. showed that several payments had been made to the church-wardens of W., but it did not appear that they were contributions towards the repair of the parish church. On the 30th of June, 1825, it was resolved by a majority of the vestry of B., duly convened for that purpose, that an offer of 550*l.* from the society for promoting the enlargement of churches and chapels should be accepted, and that the chapel should be enlarged, any deficiency in the expense to be made up by the sale of certain pews, and by rates under the act of Parliament. It was also resolved to petition the commissioners for building new churches, to erect a new church in the township, free of expense to the inhabitants. On the 29th of November, 1827, the then chapel-wardens duly executed a deed charging the chapel rates of the township with 600*l.* and interest borrowed for the purpose of enlarging and rebuilding the chapel, a part of which had been paid off:—

Held, first, that B. was not in itself a parish, within the meaning of the 58 Geo. 3, c. 45, s. 59. *Secondly*, that the resolution of the 30th of June did not contain a sufficient consent of the vestry to the borrowing of the 600*l.*, upon the security of the rates, within the same section, and therefore that a *mandamus* under the 58 Geo. 3, c. 45, to compel the defendants to pay off the arrears of that amount out of the rates, could not be supported.

¹ 20 Law J. Rep. (N. S.) M. C. 63.

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MANDAMUS under the 58 Geo. 3, c. 45, commanding the defendants to pay to the prosecutors, out of the funds in their possession and control applicable to that purpose, the balance of 490*l.* 10*s.*; but if they had not such fund, or not sufficient to pay the whole sum, then, in either case, to raise, by means of rating the township of Bilston, a sufficient sum for that purpose.

The return by the defendant Cross¹ traversed several of the allegations in the writ of *mandamus*, and upon the trial of the issues joined thereon, before Coleridge, J., at the Stafford summer assizes, 1847, the prosecutors had a verdict upon all such issues, subject to the opinion of this court on a case.

The material parts of the case were, that the township of Bilston, locally situated within the parish of Wolverhampton, had constables and maintained its own poor, and did not contribute to the repair of the church of the parish of Wolverhampton. From time immemorial, also, Bilston had chapel-wardens and a chapel, at which divine service had been performed; and the expense of repairing such chapel had always been defrayed by rates upon the possessors and occupiers of houses, lands, and tenements within the township, and not elsewhere. For very many years before the passing of the 58 Geo. 3, c. 45, being an act for building and promoting the building of additional churches in populous parishes, there had been a burial ground attached to the chapel, at which the right of burial had been regularly performed, and the sacraments of the church had been administered in the chapel. It appeared, from entries in the vestry books of Bilston, that from 1689 to 1752 various sums had been from time to time paid by the chapel-wardens of Bilston to the church-wardens of Wolverhampton, supposed to be for the church of the latter. (The case set out several of the entries.) Bilston had no other burial-ground than the burial-ground of Wolverhampton up to 1727, the present burial-ground of the township having been consecrated in that year. In the same vestry books there appeared a copy of a memorandum, therein described to be made by the clergy, chapel-wardens, and inhabitants of the chapelry of Bilston, whereby the clergy of Bilston promised to receive for the clergy of Wolverhampton church 7*d.* for the burial of every corpse in the chapel-yard of Bilston, 14*d.* for the burial of every corpse in the chapel of Bilston, and also a choir fee of 5*s.* for every corpse buried within the said chapel. Other entries showed that payments were accordingly made to the clergy of Wolverhampton from 1727 to the 10th of November, 1740, but no later; also that a payment of 10*d.* on the churching of women in the chapel had been made to the clergy of Wolverhampton during the same period, and no later. Further, too, that marriages by license and by banns were solemnized in the chapel from 1695 to 1754, after which time there was no entry of a marriage having been solemnized until about 1843, when the chapel became licensed for the solemnization of marriages under the act for the registration of births, deaths, and marriages.

¹ The defendants severed in their returns, and the return by the other defendant was demurred to.

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On the 30th^y of June, 1825, a vestry meeting was duly holden in the school-house adjoining the chapel, pursuant to a notice duly given, which stated the purpose of the meeting to be the consideration of letters received from the society for promoting the enlargement and building of churches and chapels, and to determine upon the acceptance of an offer by the society for the enlargement of the present chapel, and to resolve whether a sum of money to make up any deficiency in completing the same, be raised upon the rates according to the act of Parliament; at which meeting it was, amongst other matters, resolved by a majority of twenty-three to eight, that the sum of 550*l.* offered by the society for promoting the enlargement and building of churches and chapels should be accepted, and that the chapel be enlarged, &c., any deficiency in the expense to be made up by the sale of forty of the private pews, and by rates under the act of Parliament. It was also resolved that a petition should be presented to the commissioners for building new churches, praying them to erect a new church within the township, free of expense to the inhabitants. On the 15th of April, 1827, J. P. and T. B. were duly appointed chapel-wardens of Bilston. On the 29th of November, 1827, the said J. P., T. B., and the incumbent of the chapel, and one J. D., a former chapel-warden, executed a deed of charge, by which, after reciting the above vestry meeting, a faculty dated the 13th of January, 1826, under the seal of office of the official principal of the peculiar and exempt jurisdiction of the collegiate church of King's Free Royal Chapel of Wolverhampton, within which jurisdiction the said chapel and chapelry were situate, and a faculty dated the 14th of November, 1827, under the hand and episcopal seal of the lord bishop of Lichfield and Coventry; after reciting, also, that T. B. had agreed to lend the sum of 600*l.*, to be secured upon the chapel rates, towards enlarging and rebuilding the chapel, to be repaid with interest at the rate of 5*l.* per centum, per annum, payable half yearly, the said principal sum to be repaid, 300*l.* thereof, on the 29th of November, 1838, and 300*l.* on the 29th of November, 1839, the said J. P. and T. B. and the said J. D. did, by and with the consent of the said bishop and the said incumbent, and under the authority of the several acts passed for the building and promoting the building of churches in populous parishes, or some, or one of them, charge the township of Bilston with the said sum of 600*l.*, and with the repayment thereof, according to the terms and conditions above stated, the same to be chargeable upon the chapel rates then or thereafter to be raised in the said township, until fully repaid with interest. The works at the chapel, on account of which the above 600*l.* had been lent, were done according to a plan approved by the vestry on the 30th of June, 1825, and were finished in 1827, when the chapel was re-opened for divine service. T. B. died on the 5th of September, 1844, having appointed the prosecutors his executrix and executor. The principal sum of 600*l.* had been reduced by payments made from time to time by the chapel-wardens to 490*l.* 10*s.*, which remained due, and the defendants, who were the chapel-wardens of the township, and had been since the 8th of April, 1844, had in

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their hands 760*l.*, arising from rates made for the purpose of paying off the moneys legally borrowed on the credit of the rates.

The defendants' objections, amongst others, were, that the 58 Geo. 3, c. 45, did not apply to the township and chapel of Bilston, being within the parish of Wolverhampton, and not itself a parish; that the above resolution of the vestry was not a sufficient consent of the vestry to the borrowing of the 600*l.*, and that the money in the defendants' hands was not applicable to the payment of the debt in question.

If the court decided in favor of the defendant upon these points, the verdict was to be entered for him upon certain of the issues particularly specified.

Alexander, (*Whately* and *Gray* with him,) November 9, in support of the *mandamus*. The first and substantial question is, whether Bilston can be considered as a parish within the meaning of the 58 Geo. 3, c. 45, s. 59, the vestry of which could give a legal assent to the enlarging of the chapel. The intention of the act, as appears from the preamble, is general, and the section speaks of the enlarging of existing chapels. It gives power to the church-wardens of any parish, with the consent of the vestry or select vestry, or persons possessing the power of the vestry, and of the bishop and incumbent, to borrow upon the credit of the rates of any such parish, such sum of money as shall be necessary for defraying the expense of enlarging or otherwise extending the accommodation of the existing churches or chapels of such parish, and to make rates for the payment of interest and repayment, of the principal sum. This is a chapel possessing the parochial rights of sepulture, baptism, and other rights, and clearly within the intention and meaning of that section. In Coke's 2d Inst. 363, it is said, "When the question was whether it were *ecclesia aut capella pertinens ad matricem ecclesiam*, the issue was whether it had *baptisterium et sepulturam*, for if it had the administration of sacraments and sepulture, it was in law judged a church." And in Degg's Parson's Counsellor, 7th ed. 227, it is stated that chapels with parochial rights "differ in nothing from churches but in the want of rectories and endowments, the mother being to be served before the daughter." The same principle, too, is adopted in *The Attorney General v. Brereton*, 2 Ves. sen. 427. Upon authority, therefore, this is a parish within the 59th section, and therefore not to be excluded from so beneficial an act. Then, as to the second objection, that the resolution of the vestry was not a sufficient consent to borrow the money. If the terms of the resolution are not in strict compliance with the 59th section of the act, in that respect, the notice, in pursuance of which the resolution was passed, may be referred to, and there it would be found that the borrowing of the money is expressly mentioned as the purpose of the meeting. *Blunt v. Harwood*, 8 Ad. & E. 611; s. c. 7 Law J. Rep. (N. S.) M. C. 107. The rates can only be applied to the payment of money, which the section authorizes the vestry to borrow. The act contemplates expenses being incurred, and the borrowing of money to pay them off, and the resolution should be presumed to be according to the act.

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[*Coleridge*, J., referred to the 59 Geo. 3, c. 134.]

Here the statute especially referred to is the 58 Geo. 3, c. 45, and under that it was that the vestry proceeded, and rightly.

Keating, (*Kettle* with him,) contra. Bilston is merely a township, and not a parish, and the 5th section of the 59 Geo. 3, c. 134, shows that the legislature did not intend the act in question to include a township. The sacrament and burial test given by Lord Coke, must refer to an immemorial existence of those rites, and cannot be taken as an authority for considering Bilston as a parish since 1728, up to which time it is expressly found that it contributed to the church rates of the mother parish of Wolverhampton; secondly, to bring the case within the 58 Geo. 3, c. 45, a consent by the vestry must be shown. The resolution is merely to raise rates for any amount which might be deficient, and is not, as it ought to be, a distinct consent to borrow a sum of money on the credit of the rates; in other words, going to the full extent of the charge sought to be enforced. The vestry seems really to have acted under the 59 Geo. 3, c. 134, the 25th section of which requires just the majority stated here, whilst under the 58 Geo. 3, c. 45, a bare majority only is required. Their whole proceeding shows that they so acted. It is necessary that the money should appear to have been legally borrowed, and upon the face of the resolution that does not appear.

Alexander, in reply. The right of sepulture is only one of the *indicia* of a parish. This township, it is found, has supported its own church from time immemorial.

[*Lord Campbell*, C. J. It is shown that once it was part of a parish, and that throws upon you the burden of showing that it has ceased to be so. Before 1727 it had no cemetery, and merely obtaining a cemetery would not make it afterwards a parish.]

The act in question ought not to be construed too strictly, and may fairly be taken to apply to a district having certain essentials of a parish, and called by the name of a parish, and there need not be a parish in the strict sense of the term. The 5th section referred to, applies to a township which does not support its own church or poor.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

LORD CAMPBELL, C. J. During the argument, I felt a strong desire to be able to support the proceedings in this case; and, I regret to say, it seems wholly impossible to do so, as two fatal objections have been raised. The question turns chiefly on the construction of the 58 Geo. 3, c. 45, s. 59. [His lordship read the section.] Now, the two objections made were, first, that Bilston is not a parish within this section; secondly, that the condition of the consent of the vestry being given to

¹ LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and EARLE, JJ.

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the borrowing of the money was not performed. As to the first, it seems quite clear that this is not a parish, but is part of the parish of Wolverhampton. It has contributed certain payments to the church and clergymen of Wolverhampton, although it is said not to have contributed to the church rates. There was no cemetery prior to 1727 in the township, and although marriages had been celebrated there, as they might have been in any place before Lord Hardwicke's act passed, no marriages have been solemnized in the chapel since. It is true there have always been chapel-wardens in the township, and the poor maintained by a rate on the township; but still it is merely a chapel maintained by a district within the parish of Wolverhampton, and could not have been contemplated by the legislature when the act passed. Then, again, a condition is imposed by the 58 Geo. 3, c. 45, s. 59, that before borrowing the money the consent of the vestry should be obtained. Now, the proof of this having been done entirely fails; indeed, the inhabitants of Bilston and the chapel-wardens seem to have proceeded under another act of Parliament, the 59 Geo. 3, c. 134, and not the 58 Geo. 3, c. 45, on which alone this *mandamus* can be supported. By the 59 Geo. 3, c. 134, commissioners were appointed for the building of churches, and funds supplied for that laudable object, and certain modes are pointed out for building churches, where required for religious purposes. Now, there was a meeting in Bilston, in June, 1825, when the offer of the society for enlarging and building churches was considered, and the resolution came to that the 550*l.* offered by the society should be accepted, and the chapel enlarged according to a certain plan, and that any deficiency beyond that sum should be supplied by rates under the act of Parliament, that is, under the 59 Geo. 3, c. 134, and not the 58 Geo. 3, c. 45; and they further agreed, that a petition should be presented to the commissioners, praying them to erect a new church. There was, therefore, no consent by the vestry that the 600*l.* in question should be raised under the 58 Geo. 3, for the purpose of enlarging the chapel, and should become a permanent charge on the future rates, until paid off. Our judgment, consequently, must be for the defendants.

Judgment for the defendants.

MULLETT v. CHALLIS & another.¹

Hilary Term, January 11, 1851.

Sheriff, Duty of — Selling for under Price — Pleading.

Declaration in case against the sheriff alleged, that although defendant could have levied of goods of the execution debtor within his balliwick the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys, or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c. : —

¹ 20 Law J. Rep. (N. S.) Q. B. 161. 15 Jur. 243.

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Held, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage:—

Held, also, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized if sold for the best price which the sheriff could have obtained.

CASE against the sheriff of Middlesex. The declaration stated that the plaintiff had recovered judgment against one Charles Thorp for 88*l.* 15*s.*, and thereupon sued out a writ of *fi. fa.* directed to the sheriff of Middlesex, which writ was indorsed to levy 88*l.* 15*s.*, &c., and was afterwards delivered to the defendants, who were the sheriff of the said county. Averment, "that at the time of the said delivery of the said writ to the defendants, and thence during all the time next hereinafter mentioned, there were within the bailiwick of the defendants, as such sheriff as aforesaid, divers goods and chattels of the said Charles Thorp; and although the defendants, in the reasonable and proper discharge of their duty to the plaintiff and the said Charles Thorp, reasonably could and might have levied and caused to be made of the said goods and chattels the moneys so indorsed on the said writ, and directed to be levied as aforesaid; and although a reasonable time after the said delivery of the said writ, for the defendants to levy and cause to be made the same moneys, had elapsed before the return of the said writ and the commencement of this suit, all of which premises the defendants at and during all the time last aforesaid had notice, yet the defendants, disregarding their duty in that behalf, did not nor would within such reasonable time as aforesaid, or at any other time, levy or cause to be levied of the said goods and chattels the moneys last aforesaid, or any part thereof, respectively, but wholly neglected and omitted so to do. And the plaintiff further says, that the defendants, further disregarding their duty in this behalf, afterwards, and after the expiration of such reasonable time as aforesaid, and before the commencement of this suit, to wit, on, &c., falsely returned to the said court upon the said writ, that they had seized divers goods and chattels in the bailiwick as the goods and chattels of the said Charles Thorp, which said goods and chattels they had sold for the sum of 71*l.* 6*s.*; 15*l.*, part thereof, they had paid to the landlord of the premises whereon the said goods and chattels were seized, for rent (not exceeding one year) due to the said landlord in respect of the said premises; 9*l.* 12*s.*, further part thereof, they had paid and retained for fees and expenses due and payable for and on account of the executing of the said writ and warrant thereon, viz., &c.; and 44*l.*, residue thereof, they had paid into court, pursuant to an order of Coleridge, J.; and that the said Charles Thorp had not any other or more goods and chattels, &c., in the said sheriffs' bailiwick, whereof they could cause to be levied the residue of the said damages, or any part thereof. Pleas: first, not guilty; secondly, that there were not any goods or chattels of the said Charles Thorp within the defendants' bailiwick, whereof, &c. Issue thereon. On the trial, before Wightman, J., at the Middlesex sittings after Hilary term, in 1850, evidence was given that the goods taken in execution might

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have been sold for a better price if the sale had been properly conducted; but it appeared that there were several goods of the execution debtor which the sheriff had either not seized or not sold. It was contended for the defendants, that inasmuch as the debt was not extinguished, and the debtor had property to satisfy the debt, it was a question for the jury how much damage the plaintiff had sustained from the necessity which arose for suing out another writ. The learned judge directed the jury that the question was, what the goods would have realized if they had been sold for the best price which the sheriff could have obtained, and that that was the amount of the damages to which the plaintiff was entitled. The jury gave a verdict for the plaintiff for 29*l*. In the following Easter term,—¹

Watson moved for a rule *nisi* for entering a nonsuit, or for a new trial, on the ground of misdirection. First, when the ground of action against the sheriff is, that he sold the goods of the plaintiff negligently, and not for the best price, the declaration states that the sheriff seized the goods. *Phillips v. Bacon*, 9 East, 298. In *Keightley v. Birch*, 3 Camp. 521, the declaration contained a count adapted to that grievance, and also a count for not levying on goods within the bailiwick. The allegation in this declaration is, that the defendant did not levy; but levying may be by seizure, or by seizure and sale. *Cheston v. Gibbs*, 12 M. & W. 111; 7 Jur. 1060. The writ of *fi. fa.* is like a *venditioni exponas*, because it places the sheriff under a peremptory order to sell.

[*Wightman, J.* The breach is, that the defendants did not levy the moneys "of the said goods and chattels."]

The charge is for not selling the goods for the best price; but there was no evidence of collusion. Further, the declaration is bad for not showing special damage. In an action for a false return, the sheriff may show that the plaintiff suffered no damage from the false return. *Wylie v. Birch*, 4 Q. B. 566; 7 Jur. 626.

[*Wightman, J.* Would it be an answer to this action, that the party was solvent? If so, see what difficulty is imposed on the plaintiff; the sheriff might go on so returning, and the plaintiff might have no remedy.]

It would be a question for the jury, and they might at length give the plaintiff a verdict for the amount of the debt. *Clifton v. Hooper*, 6 Q. B. 468; 8 Jur. 958. Secondly, the jury were misdirected as to the mode of estimating the damages.

[*Lord Campbell, C. J.* How is a jury to estimate the damage arising from the risk of a debtor selling off his goods and going abroad? We are of opinion that the declaration is abundantly good, and that there was no misdirection. But you may take a rule *nisi* on the first point, whether, in support of the breaches in this declaration, evidence was admissible to show that the goods were improperly sold.]

Rule nisi.

¹ April 19, before LORD CAMPBELL, C. J., PATTESON, WIGHTMAN, and ERLE, JJ.

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Miller, Serj., and *Corrie* now showed cause. The plaintiff is entitled to a verdict upon the second issue, and therefore a nonsuit cannot be entered. The first breach is, that there were goods of the execution debtor of which the sheriff might have made the moneys indorsed on the writ, and that he had omitted to do so: the defendants should have pleaded that they sold the goods properly. *Phillips v. Bacon*, 9 East, 298, was an action against the sheriff by the execution creditor, who would not be damaged except by an improper sale of the goods. In *Keightley v. Birch*, 3 Camp. 521, which was an action against the sheriff for improper conduct in the execution of a writ of *fi. fa.*, the form of the count is not given; but Lord Ellenborough (p. 524) said, that the duty of the sheriff is to "sell for the best price he can obtain." Levying is a different act from seizing. *Heenan v. Evans*, 11 Law J. Rep. (N. S.) C. P. 1; 4 Scott's N. R. 2.

Watson, *Bramwell*, and *Burchell* contra. There is no allegation in the declaration that the sheriff seized the goods of the execution debtor; therefore the meaning of what is called the first breach is, that the sheriff would not seize, which is a different cause of action from an improper sale after seizure. The prefatory allegation would be supported by evidence that there were any goods which might have been seized, and it would not be necessary to show that goods might have been seized equivalent to the amount indorsed on the writ.

[*Lord Campbell*, C. J. The plaintiff is not bound to prove the whole of his cause of action.]

The breach is not, that the sheriff did not sell the goods.

[*Lord Campbell*, C. J. The breach is, that he did not levy the money; the action is maintainable whether he has seized or not, if he has disobeyed the exigency of the writ.

[*Patteson*, J. In 2 Chit. Pl. 565, 7th ed., there is a precedent of a declaration in an action against the sheriff for not levying, and for a false return of *nulla bona*; and he adds, "If the sheriff seized and improperly sold the goods, a count should be added, as in *Phillips v. Bacon*, 9 East, 298;" but that was an action by the execution debtor, in which the declaration must be framed in that way.]

A breach that the sheriff would not levy means by seizure; the debt is discharged by seizure, in proportion to the value of the goods seized. Gould, J., in *Clerk v. Withers*, 2 Ld. Raym. 1072; 6 Mod. 290, 297. *Mountney v. Andrews*, Cro. Eliz. 237. Further, this is an action for a false return, which will not lie without a return of the writ. Lord Ellenborough, in *Moreland v. Leigh*, 1 Stark. 388. That which is called the first breach contains only the allegations which show that the statement in the return is untrue.

[*Lord Campbell*, C. J. The false return is stated as a separate and independent grievance.]

LORD CAMPBELL, C. J. I am of opinion that the rule ought to be discharged. Two separate and independent breaches of duty are alleged. The first is, that the defendant did not nor would levy or

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cause to be made of the goods of the execution debtor the moneys indorsed on the writ. What is the meaning of that allegation? The declaration states that a judgment was recovered, and a writ delivered to the sheriff, whereby he was commanded to make of the goods of the execution debtor a certain sum of money; and it alleges that there were goods of which the sheriff might have made that money, but that the defendants, disregarding their duty, did not make the money. May not evidence be given, under that allegation, that the defendants seized goods of the execution debtor, but that, either collusively or by gross negligence, they did not make the money? I am of opinion that such evidence supports the allegation; and although there might have been a more specific allegation of the grievance, that the goods were seized and sold for less than their value, it is not necessary.

PATTESON, J. I may say for myself, that, in granting the rule *nisi*, I did not sufficiently advert to the distinction between an action by an execution creditor and an action by an execution debtor. I had in my recollection the form of the declaration in an action by the latter against the sheriff; but the declaration in that action must allege that the sheriff conducted himself negligently and improperly in the sale of the goods, because he sustains no grievance or damage otherwise. Suppose the declaration had alleged, that though the defendants had seized the goods, they had sold them for a less price than they could have got, and so did not levy the money: that would have been good, and the allegation here amounts to it. In *Moreland v. Leigh*, 1 Stark. 388, Lord Ellenborough said, that the neglecting to have the money in court was no cause of action; but in that case there was a second count, which stated that the sheriff had levied, but had not the money in court. It seems to me that Lord Ellenborough thought it necessary that the sheriff should have been ruled to return the writ. I suppose that was the ground of the decision; otherwise I cannot well understand it.

COLERIDGE, J. I am of the same opinion. Understanding the language of the declaration according to the ordinary meaning of the words, a sufficient breach of duty is alleged; and there is no course of precedents which binds us to turn the words from their ordinary meaning; and the evidence supports it.

WIGHTMAN, J. I thought at the trial, and I think now, that the declaration either contains two distinct breaches, or one combined breach, part of which was proved. With respect to the part of the declaration on which the rule turns, there is a general allegation that the sheriff, contrary to his duty, omitted to levy the money which he was commanded by the writ to levy. Mr. Bramwell says, that the breach points to the defect of duty in the sheriff in not having seized the goods; but I am of opinion that it applies to fraudulent and improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy.

Rule discharged.

The London & North-western Railway Company v. Wetherall & another.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY v. WETHERALL & another.¹

February 10, 1851.

Order of Justices — Railway Company — Repair of Highway.

An order of justices under sect. 58, of stat. 8 & 9 Vict. c. 20, directing a railway company to repair damage done by them to a road in the course of making the railway, need not specify the particulars of the damage, nor what repairs were to be done; it is sufficient if it states the length of the damaged part of the road, and orders the company to make good all damage done.

The order and conviction for disobedience of it may include several highways in the same parish.

REPLEVIN. Avowry by the defendants, upon an order, conviction, and warrant of distress made by them as two justices of the peace, under sect. 58 of stat. 8 & 9 Vict. c. 20. Pleas in bar, first, that the defendants did not duly convict the plaintiffs, in manner and form, &c.; secondly, that though the defendants did so convict the plaintiffs as in the said avowry is alleged, *de injuria*. On the trial, before Platt, B., at the Northamptonshire Summer assizes, in 1850, the order, conviction, and warrant of the defendants mentioned in the avowry were given in evidence. The order was as follows:—

“Leicestershire, to wit: Whereas, complaint hath been made to us, John Wetherall, clerk, and William de Capell Brooke, Esq., two of her majesty’s justices of the peace, acting in and for the division of Market Harborough, in the county of Leicester aforesaid, by William Haddon, of, &c., surveyor of the highways of the said parish of Thorpe Langton, in the county aforesaid, for that the London and North-western Railway Company, in the course of the formation of their branch railway called ‘The Rugby and Stamford Railway,’ had, between the 2d day of April, A. D. 1847, and the 7th day of March, A. D. 1849, made use of certain public and common highways and carriage and bridle roads, in the parish of Thorpe Langton aforesaid, viz., a certain public and common highway and carriage road, called ‘Greenhalen Lane,’ containing in length 1800 yards, or thereabouts; a certain other public common highway and carriage road, leading from the village of Thorpe Langton aforesaid towards Welham, in the county aforesaid, and containing in length 1150 yards, or thereabouts; and a certain other public and common highway and bridle road, called ‘Tipsall Bridge Road,’ and containing in length 1120 yards or thereabouts, with horses, carts, carriages, and wagons, and that in so using the said roads the said London and North-western Railway Company had done damage to and injury, and had cut up, destroyed, and made deep holes and wheel-ruts therein, and otherwise damaged the same, as hereinafter mentioned, viz., the whole of the said road called ‘Greenhalen Lane,’ containing in length, as aforesaid, 1800 yards, or thereabouts, and the whole of the said road leading from the said

¹ 15 Jur. 247.

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village of Thorpe Langton aforesaid towards Welham aforesaid, containing in length as aforesaid 1150 yards, or thereabouts, and the hereinafter mentioned parts of the said road called 'Tipsall Bridge Road,' viz., one part thereof commencing at a certain bridge, called 'Packsaddle Bridge,' and ending at the north side of the said Rugby and Stamford Railway, where the same crosses this road, and containing in length 804 yards, or thereabouts, and the other part thereof, commencing at the south side of the said Rugby and Stamford Railway, where the same crosses this road, and ending at a certain bridge, called 'Tipsall Bridge,' and containing in length 209 yards, or thereabouts; and the said London and North-western Railway Company having been duly summoned to appear before us, the said justices, in this behalf, and having appeared before us in obedience to such summons, we, the said justices, in pursuance of the provision of a certain act, (8 & 9 Vict. c. 20,) having examined into the matter of the said complaint, and having heard and examined the witnesses produced by the said William Haddon, upon oath, we, the said justices, having then and there full power and authority to administer the oaths to the said witnesses touching the said complaint, and having heard and considered what was urged on the part of the said London and North-western Railway Company, and it manifestly appearing to us that the said hereinbefore mentioned complaint is true; and it further manifestly appearing to us, the said justices, from the testimony of the said witnesses, that the said London and North-western Railway Company are liable to make good the said damage, we, the said justices, do hereby adjudge and order that the said London and North-western Railway Company make good all damage done by them in the premises hereinbefore mentioned within the space or time of five weeks from the day of the date hereof. Given under our hands and seals, at, &c., this 27th day of March, A. D. 1849.

"J. W. (L. s.)

"W. DE C. B. (L. s.)"

The warrant of distress was as follows:—

"Leicestershire, to wit: To the constables of Thorpe Langton, &c. Whereas the London and North-western Railway Company was, on the 26th day of June, A. D. 1849, duly convicted before us, the undersigned J. W., clerk, and W. de C. B., Esq., two of her majesty's justices of the peace, in and for the said county of Leicester, for that they, the said London and North-western Railway Company, in the course of making their branch, called 'The Rugby and Stamford Railway,' under the provisions of a certain act, (9 & 10 Vict. c. 67,) and of a certain other act of Parliament, incorporated therewith, intituled 'the railway clauses consolidation act, 1845,' used and interfered with certain roads in the parish of Thorpe Langton, in the county of Leicester aforesaid, and did considerable damage to the same, and did not from time to time make good the said damage so done by them, the said company, to the said roads as aforesaid, contrary to the said railway clauses consolidation act, 1845; and it having been referred to us, the said J. W., clerk, and W. de C. B., Esq., so being such justices as aforesaid, to determine the question as to the damage done to the said

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roads by the said company, and as to the repair thereof by them, and as to the period within which such repairs should be done: we, the said justices, on the 27th day of March, A. D. 1849, did adjudge, order, and direct certain repairs to be made in the state of the said roads by the said London and North-western Railway Company, to make good the said damage so done by them as aforesaid, within the space or time of five weeks from the date of the said order; and it having appeared to us, the said justices, that the London and North-western Railway Company had neglected and refused to comply with such order, and had not carried into effect such repairs, contrary to the said order, we, the said justices, did, by virtue of the said railway clauses consolidation act, 1845, impose upon the said London and North-western Railway Company, for not carrying into effect such repair, the penalty of 4*l.* 10*s.* per day, for each and every day from the 1st day of May, A. D. 1849, to the 5th day of June, A. D. 1849, amounting in the whole to the sum of 153*l.*, such penalty to be paid to the surveyors of the said roads." [The warrant proceeded to order a distress upon the goods of the company for the amount.]

It was objected for the plaintiffs that the order of the justices to repair the road should have pointed out the particular repairs required, and that the conviction should have set out the bounds of each road, and should have imposed a penalty on each road separately. A verdict was entered for the plaintiffs, leave being reserved to move to enter a verdict for the defendants. In the following Michaelmas term, November 7,—

Humfrey obtained a rule *nisi* accordingly; against which

Whitehurst now showed cause. By sect. 58¹ of stat. 8 & 9 Vict. c. 20, recourse is not to be had to the justices, unless the surveyor of the highways and the company differ as to the damage done to the road by the company, or as to the repair thereof by them; and therefore the justices are constituted referees in the matter. Their order is in the nature of an award, and ought to specify what part of the road had been damaged by the company, what damage the company had done, and what repairs were to be done by the company. Further, three roads ought not to have been included in one order.

¹ By sect. 58, of stat. 8 & 9 Vict. c. 20, "If, in the course of making the railway, the company shall use or interfere with any road, they shall from time to time make good all damage done by them to such road; and if any question shall arise as to the damage done to any such road by the company, or as to the repair thereof by them, such question shall be referred to the determination of two justices, and such justices may direct such repairs to be made in the state of such road in respect of the damage done by the company, and within such period, as they think reasonable, and may impose on the company for not carrying into effect such repairs any penalty, not exceeding 5*l.* per day, as to such justices shall seem just, and such penalty shall be paid to the surveyor or other person having the management of the road interfered with by the company, if a public road, and be applied for the purposes of such road, or if a private road, the same shall be paid to the owner thereof."

The London & North-western Railway Company v. Wetherall & another.

Humfrey and *Mellor*, contra. The order does specify the damage done by the company. As to the order being to make good "all damage done," and not specifying what repairs were to be carried into effect, when an application is made for a warrant of distress, on the ground that the order has been disobeyed, it is for the justices to determine whether the company have done sufficient repairs. Lastly, the three roads are in the same parish, and the amount of the penalty is to be paid to the surveyor of that parish, and to be by him laid out in the repair of these roads; and, therefore, there is no reason for apportioning the penalty. By the interpretation clause, sect. 3, the word "road," in sect. 58, may be read in the plural number.

[*Wightman*, J. That will only make the uncertainty greater. *Patteson*, J. From what day is the period, during which the penalty of 5*l.* per day may be imposed, to be reckoned?]

The order specifies the time within which the damage is to be made good, and, therefore, the period during which the penalty is imposed would be reckoned from the end of that time. [They referred to sect. 57.]

PATTESON, J. We are all of opinion that the order is good. The maxim, "*Lex neminem cogit ad impossibilia*," applies. It would be impossible for the justices to specify every hole and every wheel-rut made by the company in constructing their works. All that they can do is to describe the damaged part of the road by its length. Again: the order to repair generally is sufficient; it is impossible that the justices should specify what repairs are to be done, how many loads of gravel are to be laid down, or how many teams of horses employed. The order is, therefore, as specific as, under the circumstances, it could reasonably be made. Then as to the conviction, which is recited in the warrant, it refers to the order, and states the aggregate amount of the penalty, which is to be paid to the same person, the surveyor of the highways.

WIGHTMAN, J.¹ It is almost impossible, and certainly unreasonable, to require that the order should be more specific than it is; and no practical inconvenience can arise to the railway company, because they must be well acquainted with all the matters which they are called upon to repair.

EBLE, J. The order is made upon matters with which persons in the country are conversant and well acquainted; and every indictment for the repair of a highway goes into the inquiry, whether it is out of repair, and what repairs are to be done. The order of the justices, in effect, specifies what damage has been done to the roads, and is a command to repair that damage.

Rule absolute.

¹ *COLERIDGE*, J., was at chambers.

 Brookman v. Wenham.

BROOKMAN v. WENHAM.¹

January 31, and February 12, 1851.

*County Court — Certiorari — Service — 9 & 10 Vict. c. 95, s. 90 —
13 & 14 Vict. c. 61, s. 16.*

The power given by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a county court by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16.

Where the writ of *certiorari* was left with one of the clerks at the county court office:—
Held, that this was good service upon the judge.

Seem, however, the strictly proper course when there has been no actual personal service, and the cause does not come on for hearing until after the return day, would be to rule the judge to return the writ.

THIS was a rule calling upon the judge of the Southwark county court to show cause, why a writ of attachment should not issue against him for contempt in not returning a writ of *certiorari* for the removal of a plaint in a cause of *Brookman v. Wenham*, and for proceeding to try the same after service of such writ. The plaint was on contract, and for the recovery of 36*l.* 16*s.* as the amount due upon a bill of exchange. The writ of *certiorari* issued on the 6th, and was returnable on the 11th January.² On the 6th January, the defendant went to the office of the county court for the purpose of serving the writ, and there saw one of the under clerks, who told him that it ought to be served personally, and that the judge would be sitting in court on the 14th. The defendant, however, called again the next day for the purpose of seeing the chief clerk of the court, but being unable to do so, he left the writ with the under clerk whom he had seen on the preceding day. On the 15th, (the day appointed for the trial of the plaint,) after it was called on, and whilst the judge was actually engaged in trying it, a notice that the *certiorari* had been issued and lodged in the public office of the court on the 7th was handed to the chief clerk, and the writ was then shown to the judge, who, as it appeared, had no previous knowledge of its having issued. He refused to allow the writ, and proceeded to try and determine the cause, alleging as his reasons, that the day for the return of such writ had already passed at the time he received it, and that the stat. 13 & 14 Vict. c. 61, took away the power of issuing any writ of *certiorari* in cases within the operation of that act.

Horn and Giffard showed cause. Where a writ of *certiorari* is

¹ 15 Jur. 249.

² The writ was obtained upon an affidavit denying the acceptance of the bill, and stating that there was a good and *bona fide* defence to the action, inasmuch as the acceptance was a forgery, and that the defendant was desirous of removing the plaint for the following purposes: that the cause might be tried by a jury of twelve men; that the bill might be impounded; that the defendant might bring witnesses to inspect the bill previous to the day of trial; that under an order of the court he might discover the present residence and occupation of the plaintiff; and also that he might have the assistance of queen's counsel on the trial.

Brookman v. Wenham.

delivered after the return day, it does not remove any thing, and may be lawfully disobeyed. The writ of *certiorari* is not to be obeyed absolutely, but only, if it can be, legally. That was now quite clear, although it might formerly have been different. This rule was laid down in 2 Hawk. P. C. b. 2, c. 27, s. 72, and *Rex v. Rhodes*, 1 Keb. 944. Then there had been no proper service of the writ; the clerk to whom it had been delivered was not the clerk of the county court, but merely his assistant; he had told the party who came to serve the writ that he had nothing to do with it, and yet that party (who was the defendant himself) had persisted in leaving it with him. The power of removing causes involving an amount beyond 20*l.* was taken away by the 13 & 14 Vict. c. 61, s. 16. By that section, "no judgment, order, or determination given or made by any judge of a county court, nor any cause or matter brought before him, or pending in his court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." The words "hereinbefore mentioned" had reference to the 14th and 15th sections of the same act, the former giving a power of appeal to either party if he should "be dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of any evidence;" and the latter showing the mode of proceeding in such appeal. The power of removing causes under 20*l.* had been carried too far by the 9 & 10 Vict. c. 95, and, therefore, the legislature had intended to give no such power by the extension act.

[*Erle, J.* Sect. 14, in effect, says that you shall not come into the superior courts upon mere matters of fact, but only upon some misdirection of the judge, or some difficult point of law. Sect. 2 of the last act says, "that both acts shall be read and construed as one act, as if the several provisions of the former one were repeated and re-enacted." If, therefore, that act had been actually transcribed in the 2d section, one of its enactments would have been, that causes, where the debt or damage claimed exceeded 5*l.*, might be removed by *certiorari* by leave of a judge, if he should think them fit to be tried in a superior court, and upon such terms as he might think fit. If that had been done, then is it not clear that the 16th section would refer to that provision?]

If the 16th section had preceded the 14th, (and it was a mere accident that it had not,) "hereinafter" would have been the word used. The two acts were to be read together only so far as they were consistent; thus the *certiorari* might issue in all causes under 20*l.*, but not where the sum exceeded that amount. As the judge was not personally served, the proper course would have been to have obtained a side-bar rule for him to return the writ. To bring a party into contempt, he must be personally served. *Rex v. Edyvean*, 3 T. R. 352. They also cited *Ex parte Higginbotham*, 9 Dowl. 200.

Pearson, in support of the rule. Looking at the effect of the 13th section, it was clear the legislature contemplated the removal of

causes by *certiorari*, for they had there expressly declared that the plaintiff should have his costs of an action in the superior courts if he should make it appear to the satisfaction of the court, or a judge at chambers, "that the cause was removed from a county court by *certiorari*." It was contended that a *certiorari* was taken away in causes between 20*l.* and 50*l.*, but still left in causes between 5*l.* and 20*l.*, a result which could not be attributed to any act of Parliament, which must have either a negative or positive effect altogether. Another absurdity of such a construction was this — that although in actions above 20*l.* the plaintiff would have the liberty of choosing the county court for his tribunal, yet if he chose that tribunal never so improperly, there would not be jurisdiction to remove the cause; that would exist only in cases where a smaller sum was at stake.

[*Erle, J.* The question turns on the former act having given the *certiorari*, and then the latter act saying there shall be no *certiorari*, except in the manner hereinbefore given.]

It was not the former act, but the common law, which had given it. The words of the 16th section referred to the provisions of the 90th section of the former act, which laid down certain conditions, upon the performance of which alone actions could be removed into the superior courts. *Rex v. Reeve*, 1 W. Bl. 231, established the principle, that a *certiorari* can be taken away, not by general, but only by express negative, words. In *Rex v. Jukes*, 8 T. R. 542, Lord Kenyon said, "The *certiorari*, being a beneficial writ for the subject, could not be taken away without express words; and he thought it was much to be lamented, in a variety of cases, that it was taken away at all." There was no necessity for a side-bar rule, for the judge would have then made a return precisely similar to what he had now said in his affidavit, viz., that the writ was not delivered to him till the return day was past, and that under the 13 & 14 Vict. he did not consider he was bound to obey it.

[*Erle, J.* There are two questions: the first, whether the *certiorari* will issue; and the second, whether the delivery in the office was a good service.]

[The learned counsel referred to two cases in the exchequer, *Parker v. The Great Western Railway Company*, 15 Jur. 109, 1 Eng. Rep. 514; *Mungeam v. Wheatley*, 15 Jur. 110, 1 Eng. Rep. 516, in which that court had recently pronounced very strong opinions that the *certiorari* was not taken away by the 13 & 14 Vict. c. 61.]

Cur. adv. vult.

February 12. *ERLE, J.*, now delivered the following judgment: In this case the first question is, whether the writ of *certiorari* is taken away by the 13 & 14 Vict. c. 61, in causes in the county court for more than 20*l.* and less than 50*l.* I am of opinion that it is not. The 9 & 10 Vict. c. 95, provides that this writ shall issue to remove certain cases; and the 13 & 14 Vict. c. 61, incorporating the former act, must be construed to have left the power of issuing a *certiorari* as it stood under the stat. 9 & 10 Vict.

Regina v. The Justices of Totness.

c. 95. *Parker v. The Great Western Railway Company* is an authority in favor of this view. It was then said that there had been no proper service of the writ, as it was left at the clerk's office with the person in attendance there, and not served personally on the judge; but as, in practice, writs for quarter sessions are served on the clerk of the peace, and writs for the Old Bailey on the clerk of arraigns, I think it right to hold a service at the office of the chief clerk sufficient for a personal service on the judge. Thirdly, as the writ did not reach the judge till after the return day, and he states that he had no knowledge of its having issued before, there is no actual contempt; the proper course, therefore, previously to moving for an attachment, would have been to have ruled the judge to return the writ. I have had some doubt whether this rule ought not to be discharged, with costs, as no side-bar rule to return the writ was issued; but as such a rule is unnecessary where a *certiorari* has been personally served — and I think the service in the present case was equivalent to personal service — and as the writ was actually served before the return day at the office, and, not being obeyed, was after the return day personally served upon the judge to stay judgment, I think I am not authorized to fix the costs on the defendant. The chief clerk ought to have informed the judge of the writ being left at the office, and if he had done so, probably this question would not have arisen. The rule, therefore, must be discharged, without costs.

Rule discharged, without costs

REGINA v. THE JUSTICES OF TOTNESS.¹

Hilary Term, January 30, 1851.

Power of Justices to convict summarily when Complainant protests against it — 9 Geo. 4, c. 31, s. 27 — Certiorari.

E. having laid an information before a justice, complaining that M., after having assaulted, had threatened him, and praying that he might be bound over to keep the peace, the case was heard at petty sessions, and an assault was proved. The justices convicted M. of the assault, and also obliged him to find sureties of the peace, notwithstanding the protest of E. against the conviction, and his request that only sureties of the peace should be required from M.:—

Held, that the magistrates had no jurisdiction to convict M. of the assault.

THIS was a rule calling upon John Deny, Edward Luscombe, and Charles Webber, three justices of the peace for the borough of Totness, in the county of Devon, to show cause why a writ of *certiorari* should not issue to remove into this court a certain record of conviction under the hands and seals of the said John Deny and Charles Webber, made on the 27th November last, whereby Charles Frederick

¹ 15 Jur. 227.

Regina v. The Justices of Totness.

Michelmores was convicted of unlawfully assaulting and beating Jefferey John Edwards, and was adjudged to pay a fine of 5*l*. The rule was obtained upon the ground that the justices had no jurisdiction to convict, as there had been no complaint of an assault by Edwards, the party aggrieved, and as he protested at the hearing against the conviction. It appeared, from affidavits, that the prosecutor had gone before a magistrate, and laid an information to the effect that Michelmores, "after having repeatedly struck this complainant, did utter to him the following words: 'I'll serve you the same whenever I meet you'—against the form of the statute in such case made and provided; and that from the above premises this complainant is afraid that the said Charles Frederick Michelmores will do him some grievous bodily injury, and therefore prays that the said Charles Frederick Michelmores may be required to find sufficient sureties to keep the peace towards him, this complainant. And this complainant also says, that he does not make this complaint against nor require such sureties from the said Charles Frederick Michelmores from any hatred, malice, or ill will, but merely for the preservation of his life and person." Upon this complaint a summons was issued, and in pursuance thereof the parties, with their attorneys, appeared before the magistrates mentioned in the rule. The prosecutor requested an adjournment from the council chamber to the guildhall, in order that a more public investigation might take place. The magistrates accordingly adjourned to the guildhall, and after hearing all the evidence, they came to the conclusion that they had jurisdiction to convict the defendant of the assault, as well as to require him to give sureties for keeping the peace towards the prosecutor; and that the assault, which was proved, was of such a nature as to be properly disposed of by a summary conviction. They accordingly convicted the defendant of the assault, and also required him to find sureties of the peace. The prosecutor, however, protested against the justices proceeding to convict summarily, and required them only to bind the defendant to keep the peace.

Ball, for the justices, now showed cause. The conviction was good; although the complaint before the magistrate, in the first instance, appears to have been merely for the purpose of obtaining sureties, yet when Edwards came into a public court, and was not only himself examined as to the assault, but also called witnesses to prove it, the magistrates had a right to look at all the circumstances, and to adjudicate accordingly. By 9 Geo. 4, c. 31, s. 27, power is given to the justices, upon complaint of the party aggrieved, to hear and determine the offence "where any person shall unlawfully assault or beat any other person:" they had, therefore, full power in this case, when the assault had been proved before them, summarily to convict the party. By the 36th section, no conviction under the act is to be removed by *certiorari*. If, however, the magistrates have no jurisdiction, it may be so removed. *Anon.*, 1 B. & Ad. 382. But here the assault committed was within their jurisdiction, and one which they rightly heard and determined. If, however, the court should be of a

different opinion, it was still discretionary to grant or refuse the *certiorari*,— *Rex v. Bass*, 5 T. R. 251,— and this was a proper case for its refusal.

Collier and Kingdon, for Michelmores. The defendant had been rightly convicted, and the justices had exercised a sound discretion, the statute being framed for the purpose of allowing them to decide such matters. The conduct of the complainant himself was calculated to strengthen the justices in their opinion, that they had jurisdiction to convict summarily, for he had objected to the inquiry taking place in a private room, and insisted on the magistrates adjourning to the guildhall, thereby leading them to believe that he intended the whole matter should be inquired into and fully adjudicated upon. The first question was, whether the justices had jurisdiction to convict of the assault; and the second, whether the discretionary power of the court would not be better exercised by withholding the *certiorari*. The attention of the justices had not been drawn to the fact of the complainant seeking articles of the peace till the end of the inquiry; and the conduct of the parties was such as to induce the justices to think the assault was complained of. *Reg. v. The South Holland Drainage Company*, 8 Ad. & El. 429.

[*Erle, J.* What is the meaning of being assaulted "against the form of the statute" ?]

It must mean that an assault was charged; and if the justices could gather from the information that an assault was charged, they would be right in summarily convicting.

[*Erle, J.* If there were any ambiguity, that would be so; but here, before the magistrates came to a decision, the prosecutor removed all doubt, by protesting against their jurisdiction to convict, and saying that he only sought sureties of the peace.]

The prosecutor's case was closed before that was done.

[*Erle, J.* The question of jurisdiction depends on the facts existing at the time when the first step was taken.]

The justices could not legally travel out of the written information; they could not inquire what took place before the justice who issued the summons.

[*Erle, J.* Evidence of an assault is perfectly legitimate upon an application for sureties to keep the peace.]

The complainant had given evidence of an assault.

[*Erle, J.* You say, that if a party, in the course of making a complaint (of whatever description) before justices, happen to prove an assault, they may find the defendant guilty of an assault.]

Yes; if the assault is charged in the information.

[*Erle, J.* Take the case of an attempt to rob.]

There the information would include a larger complaint than an assault, and the magistrate's power to convict summarily would be taken away by the 29th section of the act. The statute says, that such a conviction shall be a bar to all further proceedings, civil as well as criminal. [They also cited *Reg. v. Bolton*, 5 Jur. 1154; 1 Q. B. 66. *Tunncliffe v. Tedd*, 17 Law J. Rep. (N. S.) M. C. 67; 5 C.

Brown v. Glenn.

B. 553. *Rez v. Tbd*, 1 Str. 530; and *Reg. v. The Cheltenham Commissioners*, 5 Jur. 867; 1 Q. B. 467.]

Crowder and *Phinn* appeared to support the rule, but were not called upon.

ERLE, J. The party assaulted has the choice of several remedies; he may have his action, proceed by indictment, or apply to the magistrates for a summary conviction. In this case I am of opinion that the magistrates had no jurisdiction to convict summarily. Although the party assaulted may not intend to complain, so as to give the magistrates jurisdiction, yet if nothing appears to that effect—nothing to show that he has not applied to them for a summary conviction, every intendment must be taken against him. Here the complaint made to the first magistrate was for sureties of the peace, and not for a summary conviction; and the information was worded, and I think correctly, so as to bear that construction.¹ The matter subsequently came on for hearing before the other magistrates; a doubt arose as to whether or not an assault was not complained of, so leaving it to them to exercise any jurisdiction they might have at law; but, in its ordinary sense, I think the information meant otherwise. The complainant, however, removed all doubt, by protesting that he did not make the complaint in the manner understood by the magistrates, and informed them, so far as he was concerned, that they had no right to proceed summarily. I can well understand, from the circumstances, that they were desirous, if they had the power, of putting an end to the proceedings, but I am not at liberty to consider those circumstances. There is no doubt Edwards did not intend to make his complaint so that the magistrates might summarily convict, but the contrary; and the rule must be made absolute.

Rule absolute.

BROWN v. GLENN.¹

Hilary Term, January 15, 1851.

Distress — Breaking and Entering.

A landlord may not break open the door of a stable, though without the cartilage, in order to make a distress.

TRESPASS for breaking and entering the house, and taking two horses of the plaintiff.

Plea — Not guilty, by statute.

On the trial, before Lord Campbell, C. J., at the sittings in Middlesex after Trinity term, 1850, it appeared that, in executing a warrant of distress for arrears of rent due to the defendant from the plaintiff,

¹ 15 Jur. 189.

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the defendant broke open the locked door of a stable, and took the horses there found. The stable was not within the curtilage of the dwelling-house, but there was over it a room in which the groom or stableman slept, and between which and the stable there was an internal communication. The lord chief justice held, that the stable, being locked up, was privileged; and a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit. In the following Michaelmas term, (November 5,) —

Knowles obtained a rule *nisi* accordingly, citing *Penton v. Browne*, 1 Sid. 186; 1 Keb. 698, in which it was held, that the sheriff, in executing a writ of *fi. fa.*, may break open the door of a barn detached from the house.

Humphrey and *Charnock* now showed cause. First, the building in question is a dwelling-house, and it would be so laid in an indictment for burglary. *Rex v. Turner*, 1 Leach's C. C. 305. *Rex v. Westwood*, Russ. & R. C. C. 495. Secondly, any building with locked door is privileged. *Penton v. Browne*, 1 Sid. 186; 1 Keb. 698, was the case of the execution of a *fi. fa.* by the sheriff, and therefore is not applicable. Lord Hardwicke, in a case before him at the Summer assizes at Exeter, A. D. 1735, held that a padlock put on the door of a barn could not be opened by force to take the corn by way of distress. 9 Vin. Ab., "Distress," 128, E. 2, pl. 6, cited in 2 Bac. Ab., "Distress," C. 700, in the margin. In note 2 to *Poole v. Longueville*, 2 Wms. Saund. 284, c. 6th ed., as to the place where a distress for rent may be taken, it is said, "Nor can the landlord enter into his tenant's barn if it be locked," and the case before Lord Hardwicke is cited. In Co. Litt. 161, a, it is said, "The lord cannot break open gates, or break down the enclosures, to take a distress."

Knowles and *Gifford*, contra. The building in question is not a dwelling-house within the authorities. The facts in the case before Lord Hardwicke are not reported; the barn may have been within the curtilage; and the passage cited from Co. Litt. 161, a, is to be taken with reference to the doctrine of disseizin; the landlord is not allowed to do any act at variance with his covenant for quiet enjoyment.

[*Coleridge*, J. That covenant would be equally broken if the landlord entered into a field, the gate of which was not locked. Littleton, in sect. 237, mentions three causes of disseizin of rent service, viz., rescous, replevin, and enclosure; and explains enclosure to be, "if the lands and tenements be so enclosed, that the lord may not come within the lands and tenements for to distrain;" and upon that Sir Edward Coke says, "Enclosure is here explained, and needs no other explanation; for the lord cannot break open the gates, or break down the enclosures, to take a distress; and therefore the law accounts it a disseizin."]

That amounts to saying that the landlord cannot break any thing. The decision in *Penton v. Browne*, 1 Sid. 186; 1 Keb. 698, which is cited in 1 Smith's L. C. 45, is applicable; no distinction between

execution under a *fi. fa.* and a distress is pointed out in the books. The reason given for the prohibition against breaking open the outer door of a dwelling-house, that "a man's house is his castle for safety and repose to himself and his family," Frost. Disc. 319, does not apply to a stable. The protection does not extend to the dwelling-house of a third person; the outer door of a dwelling-house may be broken open when the owner of the house harbors the goods of the execution debtor, after denial on request made. *Semayne's Case*, 5 Rep. 91, a, 93, a.

[*Lord Campbell*, C. J. That argument leads to the inference that the outer door of a dwelling-house may be broken open for the purpose of making a distress, which is a *reductio ad absurdum*.]

[*Patteson*, J. Sect. 1 of stat. 11 Geo. 2, c. 19, enables landlords to follow goods fraudulently or clandestinely removed from the premises, and to seize them as a distress, and to sell them in such manner as if they had been distrained upon the premises; and sect. 7 enacts, that where the goods fraudulently or clandestinely removed have been placed in any house, barn, &c., locked up, fastened, or otherwise secured, so as to prevent them from being taken as a distress, the landlord may break open the house, barn, &c., as he might have done if they had been put in any open field or place; that seems to be a recognition that the landlord cannot break open a barn when locked, because it seemed necessary expressly to give the landlord such power.]

That power might be given from excessive caution. *Semayne's Case*, 5 Rep. 93, a, was not accepted as good law for some time, and therefore there was reason for reporting *Penton v. Browne*, 1 Sid. 186; 1 Keb. 698. None of the reasons there given justify a decision that the stable in this case could not be broken open.

LORD CAMPBELL, C. J. It is unnecessary to consider the effect of the groom sleeping over the stable, because I am of opinion, that it being a stable, with locked doors, the distress was unlawful. The authority from Co. Litt. 161, a, is very strong, and construing the passage reasonably, it applies to the outer fastenings alone. Stat. 11 Geo. 2, c. 19, to which my brother *Patteson* referred, is also very important, because, after giving power to follow goods fraudulently or clandestinely removed, within thirty days, and to take and seize them as a distress, it proceeds to add, in sect. 7, that the landlord (a constable being first called to his assistance) may break open the house, barn, stable, out-house, &c., and distrain the goods; which affords a strong inference, that without that statutory authority the outer door could not be broken open, because it would have been enough to give the same power within thirty days, as if the goods had remained on the premises. The case before Lord Hardwicke has always been cited as an authority, and is so cited for the doctrine laid down in note 2 to *Poole v. Longueville*, 2 Wms. Saund. 284, c, 6th ed. The authority of *Penton v. Browne*, 1 Sid. 186; 1 Keb. 698, cited on the other side, is a solemn decision, that the sheriff may break open the door of a barn not parcel of the dwelling-house; but that is not consistent with the doctrine for which the plaintiff contends. There may be, very reasonably, a distinction between the authority of law exercised by

Ex parte Pym, in re The Land Tax Commissioners.

the sheriff, as an officer of process of a court of justice, and the authority of a person who is allowed to take the law into his own hands; and there is a well-known and strong difference, in this, that the landlord may not distrain at all hours, but only during the daytime, whereas there is no such limitation to the power of the sheriff; and the landlord may reasonably be placed under the restriction of not breaking open any outer door in making a distress.

PATTESON, J. I quite agree with my lord, that the distinction between the landlord and the sheriff is well taken.

COLERIDGE and WIGHTMAN, JJ., concurred.

Rule discharged.

*Ex parte PYM, in re THE LAND TAX COMMISSIONERS.*¹

January 30, 1851.

Land Tax—Assessment of.

Though the assessments of the land tax upon counties are perpetual, the commissioners ought to assess the amount charged upon each land tax division by an equal pound rate, according to the fluctuations in the value of property within the division.

RULE calling upon the land tax commissioners, acting for the land tax division of Bradley Haverstoe, in the county of Lincoln, to show cause why a *mandamus* should not issue commanding them to cause the proportion of land tax charged on the said division to be equally taxed and assessed within the said division, and within every parish and place therein, according to the best of their judgment and discretion, for the year commencing on the 25th March, 1847. It appeared from the affidavits in support of the rule, that pursuant to stat. 38 Geo. 3, c. 5, made perpetual by stat. 38 Geo. 3, c. 60, the sum of 71,907*l.* 0*s.* 8*d.* was directed to be assessed and taxed upon the county of Lincoln, by way of land tax, and that the said county had been immemorially divided into certain wapentakes or hundreds, which had been during all the time that the several acts regulating the assessment and collection of the land tax had been in force, and still were, the land tax divisions of the said county, and that one of the said wapentakes, hundreds, or land tax divisions, was called "Bradley Haverstoe," and consisted of various parishes, places, and townships, which uniformly and invariably had been, and still were, separately assessed to the land tax, for raising in each such parish, place, or township its proportion or quota of the amount chargeable on the entire wapentake, hundred, or land tax division of Bradley Haverstoe; and that the township of Bradley, in the wapentake, hundred, or land tax division of Bradley Haverstoe, during all the time aforesaid, had been,

¹ 15 Jur. 190.

Ex parte Pym, in re The Land Tax Commissioners.

and still was, a separate township therein, and not a hundred, lathe, rape, ward, or other land tax division within the meaning of any statute relating to the land tax; that the land and hereditaments in the said township were charged to the land tax for the year commencing on the 25th March, 1847, at the sum of 66*l.*, in the land tax assessment made for that land tax year, by the commissioners for putting in execution the several land tax acts within the said wapentake, hundred, or land tax division of Bradley Haverstoe; that the annual value of all the lands and hereditaments within the township of Bradley, before and at the time of making the said assessment, did not exceed, and had not at any time afterwards exceeded, and did not then exceed, the sum of 1122*l.*, and that therefore the owners of the lands and hereditaments within the township of Bradley were, by the last-mentioned assessment, charged after the rate of 1*s.* 2*d.* in the pound on the annual value thereof; that the total amount of land tax not redeemed in the wapentake, hundred, or land tax division of Bradley Haverstoe did not at any time during the period aforesaid exceed, and did not then exceed, 1880*l.*, and that the total annual value of lands and hereditaments within the said land tax division, upon which the land tax from time to time during the period aforesaid had not been nor was then redeemed, was not at any time during the period aforesaid, nor was then, less than 65,000*l.*; therefore a land tax, chargeable at an equal pound rate upon the whole of the lands and hereditaments not redeemed in the land tax division of Bradley Haverstoe, would not exceed 7*d.* in the pound; and the owners of lands and hereditaments within the township of Bradley were overcharged for the land tax, in the year 1846, about 7*d.* in the pound; that part of the land tax division of Bradley Haverstoe, of the annual value of 11,500*l.*, during all the period aforesaid, had been and still was assessed to the land tax at less than 2*d.* in the pound. The affidavits then showed that an appeal was duly made on behalf of the applicant against the land tax assessment for that year, and that the appellant produced to the commissioners certain calculations based on the property tax assessments in support of the appeal, but that the commissioners did not alter the quota at which the township was assessed, but assessed the several parishes and townships in the said division in the same proportions as in the former years, without reapportioning the same, according to the proportionate values of the property chargeable to the land tax in the respective parishes and townships. The affidavits of the commissioners, in answer, stated, that on the appeal no sufficient evidence was adduced before them to establish that an equal pound rate upon the annual value of all the lands and tenements within the land tax division of Bradley Haverstoe chargeable with land tax was a fraction less than 7*d.* in the pound, or any other given sum of money, and that the said appeal was dismissed because the evidence and proof adduced in support thereof was not sufficient to satisfy the deponents that there was the over-assessment of the parish of Bradley complained of; that they did not know, and that they had not any practicable means of ascertaining, what is the annual value of the lands and hereditaments within

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the land tax division of Bradley Haverstoe chargeable with land tax; that they had not, as land tax commissioners, any power or control over the property tax assessments of the said land tax division, nor any power to compel the production thereof, for the purpose of ascertaining therefrom what is the annual value of the lands and hereditaments within the said land tax division chargeable with land tax; that the quotas of land tax charged on each parish and place within the said land tax division had never been changed for more than one hundred years; that on the occasion of making their said assessment, they had not, according to the best of their judgment and discretion, sufficient evidence before them, or in their power, to enable them to alter or correct any errors or inaccuracies that might exist in the said ancient parochial quotas; and that in making the said assessment, and continuing the said ancient parochial rates, they acted to the best of their judgment and discretion in conceiving that they were exercising a sounder discretion in continuing the said ancient parochial quotas, and leaving it to any party, who thought himself aggrieved, to his remedy by appeal, than they would have exercised in case they had made such assessment otherwise than as they did make it.

Hugh Hill (Phipson was with him) showed cause. Previous to stat. 4 Will. & M. c. 1, the land tax acts were annual. In 1798 the tax, which by sect. 2 of stat. 38 Geo. 3, c. 5, was imposed for that year only, was by sect. 1 of stat. 38 Geo. 3, c. 60, made perpetual: the sum fixed for the county of Lincoln was 71,907*l.* 0*s.* 8*d.*, to be assessed annually. Stat. 42 Geo. 3, c. 116, repealed stat. 38 Geo. 3, c. 60, except sect. 1. By sect. 7 of stat. 38 Geo. 3, c. 5, which is not printed in the common edition of the statutes, the commissioners are to ascertain the several proportions which ought to be charged upon every hundred, lathe, wapentake, rape, ward, or other division, for raising the sum charged upon the whole county, by charging in proportion to the sums which were assessed on the same hundreds or divisions of stat. 38 Geo. 3, c. 5, by stat. 4 Will. & M. c. 1; and by sect. 8, the commissioners are authorized to cause the several proportions charged on the hundreds and other divisions to be equally assessed within every such hundred or other division, and within every parish and place therein, "according to the best of their judgment and discretion," and for that purpose to appoint assessors of the rates and sums of money by that act imposed, who are to assess the sum given them in charge by an equal pound rate upon all manors, lands, tenements, rents, hereditaments, and other the premises within the parishes or places for which they shall be appointed assessors. By sect. 23, all questions touching the assessments shall be heard and finally determined by the commissioners upon complaint by the party thereby grieved, "without further trouble or suit in law in his majesty's court of king's bench, or any other court whatsoever." And by sect. 84, if any person who shall be assessed shall, upon complaint to the commissioners, make it appear to them, by proof upon oath, that such assessment exceeds the equal pound rate that ought to be charged upon him, the commissioners are empowered to abate the assessment

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so much as the same shall exceed the equal pound rate that ought to be charged on him, and shall cause the money so abated to be reassessed and levied in such manner as they in their judgment and discretion shall think most equal, just, and reasonable, within the whole hundred or other division. A *mandamus* will not lie: this matter is placed in the judgment and discretion of the commissioners, and they have exercised their jurisdiction. Further, stat. 38 Geo. 3, c. 5, gives two appeals; one by sect. 8, from the assessors to the commissioners; and another, by sect. 84, to the party charged: therefore *mandamus* is not the proper mode of appealing from their judgment. *Reg. v. The Justices of the West Riding of Yorkshire*, 1 Q. B. 624; 5 Jur. 824.

Sir F. Thesiger, (with him were *Watson*, *R. Hall*, and *S. Miller*,) contra. The expenses of the commissioners in relation to the assessments are provided for by sect. 8 of stat. 6 Geo. 4, c. 32, which enacts, that the commissioners of the treasury may order and direct the allowance and discharge of expenses necessarily incurred by the commissioners, or their clerk, in the due execution of the act. These applications used always to be made to the court of exchequer, when the duplicates were returned to the king's remembrancer; but since that has been altered, the court of exchequer have refused to interfere; and therefore there is no other remedy but *mandamus*. [He was then stopped.]

LORD CAMPBELL, C. J. Though the assessments upon counties are perpetual, whatever variation there may be in the value of the property within them, there ought to be an equal assessment within the land tax divisions, and the commissioners ought to assess the amount charged upon the division by an equal pound rate over the whole division. The commissioners certainly might have done more than they have; they might appoint assessors for that purpose. But, at the same time, there is great difficulty in saying that we can grant a *mandamus*.

COLERIDGE and WIGHTMAN, JJ., concurred.¹

Sir F. Thesiger asked that the rule should be discharged, without costs.

LORD CAMPBELL, C. J. The commissioners evidently made a mistake in adopting the ancient quota, notwithstanding the fluctuation in the value of property; and therefore they ought not to have their costs.

Rule discharged, without costs.

¹ PATTESON, J., was at the sittings at Guildhall.

Ex parte Coley.

*Ex parte COLEY.*¹

Hilary Term, January 29, 1851.

Order of Justices, good in Part and bad in Part—7 & 8 Vict. c. 101, s. 3—11 & 12 Vict. c. 44, s. 5.

An order of justices, bad in part, may be enforced as to the good part, provided that, on the face of the order, the two parts are clearly separable; and it is not necessary in such a case to quash the bad part of the order before enforcing the residue.

An order in bastardy directed the putative father to pay for the maintenance of the child from the time of its birth, although, as the application was made after two months had elapsed from the birth, the payment ought to have been directed to commence only from the time of the application:—

Held, that the order was divisible, and that it might be enforced, so as to charge the father from the time of the application.

A RULE had been obtained, under the 11 & 12 Vict. c. 44, calling upon John Green and Edward Moore, (two of the justices of the county of Worcester,) and Thomas Darby, to show cause why the said two justices should not issue their warrant of distress under an order in bastardy. Application for the order had been made on the 14th May, 1850, and thereupon the said Thomas Darby was adjudged to be the putative father of a bastard child of the said Elizabeth Coley, and directed to pay the sum of 2s. 6d. weekly from the birth of the child, viz., the 28th February, 1850. The order was in the terms following: "Whereas one Elizabeth Coley, single woman, residing, &c., did, on the 14th May, 1850, having been delivered of a female bastard child within twelve calendar months prior thereto, make application, &c.; and whereas the said Thomas Darby having been duly served, &c., and it being now proved to us, in the presence and hearing of the attorney attending on behalf of the said Thomas Darby, that the said child was, since the passing of stat. 7 & 8 Vict. c. 101, on the 25th February, 1850, born a bastard of the said Elizabeth Coley; and we having, &c., do hereby adjudge the said Thomas Darby to be the putative father of the said child; and having regard to all the circumstances of this case, we do now hereby order that the said Thomas Darby do pay unto the said Elizabeth Coley, the mother of the said bastard child, so long as she shall live, &c., the sum of 2s. 6d. per week, from the birth of the said child, until the said child shall attain the age," &c. A written notice, signed by the mother, abandoning all claim in respect of the period from the time of the birth to the time of making the application, had been served upon the putative father, and the weekly payments accruing due from the latter period only had been demanded.

Archbold now showed cause. The order in bastardy was bad, the justices having no jurisdiction whatever to make it. The question arose upon the 3d section of the 7 & 8 Vict. c. 101, which awarded

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different sums for the maintenance of the child, according to the time of the application. By that section it was enacted, "that if the application be made before the birth of the child, or within two calendar months after the birth of the child, such weekly sum may, if the said justices think fit, be calculated from the birth of the child, at a rate not exceeding 5s. per week, for the first six weeks after the birth of such child, and in other cases such sums shall not exceed 2s. 6d. per week from the time of making the application." The child in this case was born on the 25th February, 1850, and application for the summons was not made till the 14th May in that year; more than two calendar months, therefore, had elapsed between the birth and the application. The justices, accordingly, could not make an order for payment of any sum between the birth and the 14th May, but they had ordered a sum to be paid from the time of the birth. The court could not interfere; for, if this rule were made absolute, it would compel the justices to issue a warrant of distress directly varying in its terms from their order. In civil proceedings a variance between the writ of execution and the judgment would be fatal, and this is in the nature of a civil proceeding. In *Rex v. Maulden*, 8 B. & Cr. 78, the justices had ordered a certain sum to be paid for the by-gone maintenance of a lunatic, and also a certain sum prospectively for his maintenance, when they could not legally make a retrospective order; and the court held the order, so far as it related to the by-gone time, to be bad, but good as to the residue. The point, however, had not been argued in that case, and the court would not now act upon it as an authority. *Rex v. St. Nicholas, Leicester*, 3 Ad. & El. 79, seemed to have been decided on the authority of *Rex v. Maulden*. The court had no power to amend an order of justices, which, in effect, would be done if this rule was granted. The court of quarter sessions only could do that, by the 5 Geo. 2, c. 19. The proper course would have been to have come here to quash the order, and then to have applied to the justices for a fresh one.

M. D. Hill, in support of the rule. The cases fully establish the principle, that, in an order of justices, good in part and bad in part, where it clearly appears on the face of the order which part is good and which bad, they may be separated, and the maxim "*utile per inutile non vitiatur*" applies. Notice of abandonment of that part of the order which was bad had been given to the putative father. [He cited *Rex v. Price*, 6 T. R. 147; *Rex v. Stoke Bliss*, 6 Q. B. 158; s. c. 13 Law J. Rep. (n. s.) Q. B. 311; *Reg. v. Minster*, 4 New Sess. Cas. 116; s. c. 19 Law J. Rep. (n. s.) M. C. 185, when he was stopped.]

ERLE, J. The cases brought before me have established the doctrine that this court, in the exercise of its appellate jurisdiction over the orders of justices, will, if an order, defective in part, be removed here by *certiorari*, quash it only so far as it relates to the bad part, if that can be separated from the portion which is good. I am of opinion that the justices may abandon the void part of an order, if

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it appear on its face that it is severable from the residue. It seems to me to be a recognized principle of law, that an order good in part and bad in part, if capable of being divided, may be sustained *quoad* the good part; and I think it then follows, that the valid part ought to be enforced without the useless expense of a *certiorari*. *Reg. v. Stoke Bliss* was distinctly decided on the ground that the two parts could not be severed, the giving of costs to the respondents in that case being ancillary to the judgment confirming the order of removal; and the principal failing, the ancillary would fail with it. That was the distinction which the court there pointed out. The two parts, they said, were so interwoven as not to be separable. In this case one part is good and one bad; but the line can be plainly drawn between them.

*Rule absolute.*¹

REGINA v. MAY.²

Queen's Bench Bail Court, January 30, 1851

Quo Warranto — Costs — 6 & 7 Will. 4, c. 104, s. 8.

M., an unqualified person, was elected a town councillor of the borough of B., without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be liable to a fine, he signed the usual declaration. Upon application for a *quo warranto*, he sent in a written resignation to the town clerk, which was accepted:—

Held, that the relator was not entitled to the costs of the application.

THIS was a rule calling upon the defendant to show cause why an information in the nature of a *quo warranto* should not be filed against him, to show by what authority he exercised the office of town councillor for the borough of Blandford Forum. It was admitted that the election could not be maintained, and the only question was, whether the relator was entitled to the costs of the present proceedings. The facts of the case sufficiently appear in the arguments of counsel.

Shee, Serj., and *Barstow* showed cause. The defendant did not dispute the invalidity of the election; he had at once resigned when the objection was made known to him. He was elected without any previous application or desire on his part; and the first intima-

¹ In *Barton v. Bricknell*, 20 L. J., (N. S.) M. C. 1; 1 Eng. Rep. 298, a justice had convicted the plaintiff in a penalty, and adjudged that it should be levied by distress and sale, but exceeded his jurisdiction by ordering the plaintiff, in default of payment, to be set in the stocks. The latter alternative, however, was not put into force, as the penalty was levied by distress. The court held, that the 11 & 12 Vict. c. 44, s. 2, applies only to those cases where the act in respect of which the action is brought against the justice is itself an excess of jurisdiction, and therefore that an action of trespass for seizing the goods under the distress was not maintainable. It seems it would have been different if the action had been for putting the plaintiff into the stocks.

² 15 Jur. 129.

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tion he had of it was by a letter from the town clerk, informing him of his election to the office, and that if he did not accept it, he would be liable to a fine of 5*l*.; he then, in consequence of that intimation, made the declaration of acceptance of the office, but beyond that had not acted in any way whatever. Finding, however, that an application had been made to this court, he wrote to the town clerk, saying he should not oppose it, and tendering his resignation, which was accepted. It was not, therefore, necessary to have come to this court at all. *Reg. v. Morton*, 4 Q. B. 146; s. c. 12 Law J. Rep. (N. s.) Q. B. 123; 7 Jur. 85, would be relied on by the other side; but there was a broad distinction, for in this case May had done nothing whatever towards his election. The court could exercise a discretion as to costs, and this was a case in which they would not give any.

Crowder and *Pashley*, in support of the rule. There was no valid resignation in this case. The stat. 6 & 7 Will. 4, c. 104, pointed out the only legal way of resigning the office of town councillor, and the defendant had not adopted it. By sect. 8 of that statute, "every person elected into any corporate office in any of the said boroughs may at any time resign such office on payment of the fine which he would have been liable to pay for non-acceptance of the same office." Here May had not paid the fine, but merely sent in what he called his resignation. He was, therefore, still in office, and the only mode of getting him out was by *quo warranto*; besides, he had never resigned till this rule was obtained. This was the ordinary case of a *quo warranto*, to which there was no defence. *Reg. v. Morton* was conclusive upon the point. One of the grounds upon which the rule had been obtained was, that the defendant was not a person duly qualified to fill the office. This was not disputed; and he, therefore, was to blame for having signed the declaration, knowing he was not qualified — a circumstance which made this a stronger case than that of *Reg. v. Morton*, where the defendant had been free from all blame. In *Reg. v. Warlow*, 2 Mau. & S. 75, Lord Ellenborough had said, "that assuming it to be a valid resignation, still the rule must be made absolute, for a resignation was not an answer, although it might regulate the discretion of the court in imposing the fine."

ERLE, J. The act of May in accepting this office was that of a man discharging a public duty, rather than that of a man doing a thing for his own private pleasure or benefit. Was it then necessary for the relator to have applied for a *quo warranto*? May having so taken the office, and being indifferent about it, would gladly have made a valid resignation had an opportunity been given him of doing so before the application was made to this court. Following, then, the example set in the case of *Reg. v. Morton*, the rule will be absolute, but the information will not be filed, if the defendant make a valid resignation of the office at the next corporate meeting, or as soon as is practicable. If, however, it is necessary to file the information, then the defendant must file a disclaimer thereto within a week after

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notice; and if he neither resign nor disclaim, this rule is to be absolute unconditionally.

Rule absolute accordingly.

The following rule was afterwards drawn up: "It is ordered that an information in the nature of a *quo warranto* be exhibited against Joseph May, to show by what authority he claims to be a councillor of the borough of Blandford Forum, upon the grounds mentioned in the rule *nisi* for the said information, made on the 23d November, in the last term; but that the said information be not filed, if the said Joseph May shall make a valid resignation of the said office at the next corporate meeting of the said borough, or as soon as is practicable; or in case it shall be necessary to file the said information, the same to be filed at the prosecutor's expense, and the defendant to file a disclaimer thereto at his own expense within a week after notice shall have been given to him of the filing of the said information; and in case such resignation shall not be made or the said disclaimer shall not be filed as aforesaid, the rule for the said information to be absolute unconditionally."

ALEXANDER v. THOMAS.¹

Hilary Term, January 23, 1851.

Bill of Exchange — Condition to.

An instrument directed to C. S., by which defendant requested C. S., "ninety days after sight, or when realized," to pay plaintiff, is not a bill of exchange.

ASSUMPSIT. The declaration stated, "that the defendant, on the 19th November, 1839, in parts beyond the seas, to wit, at Peshawur, in India, made his bill of exchange in writing, and thereby directed the same to one Charles Shadwell, and thereby requested the said Charles Shadwell, ninety days after sight, or when realized, of that his (defendant's) first bill of exchange, second and third of the same tenor and date being unpaid," to pay the plaintiff. Averment, that "although the period of ninety days after presentment and sight thereof to and by the said Charles Shadwell elapsed before the commencement of this suit," the defendant had not paid. There was also a count upon an account stated. Pleas: first, *non assumpsit*; secondly, that the defendant did not draw the bill. On the trial, before Lord Campbell, C. J., at the London sittings after Easter term, in 1850, a verdict was given for the plaintiff, with leave to move to enter a verdict for the defendant. In the following Trinity term, (May 22,) —

Knowles obtained a rule *nisi* accordingly, or for arresting the judgment; against which

Watson and *Montague Smith* now showed cause. The question is,

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whether the instrument set out in the declaration is a bill of exchange. Either the words "or when realized" are insensible, because they do not specify out of what fund or by whom the sum is to be realized, and may be rejected, and then the bill is payable absolutely at the end of ninety days after sight; or, by virtue of those words, the bill must be payable sooner, otherwise no effect can be given to the words "ninety days after sight." It would have been different if the words had been "ninety days after sight, and when realized:" in that case there would have been a contingency which might never have arrived.

[*Lord Campbell*, C. J. If the words have a mercantile meaning, might not the plaintiff have alleged that in his declaration?]

The instrument is to be construed *ut res magis valeat quam pereat*. A promissory note, payable six weeks or one year after the death of the maker, is good. *Cooke v. Colehan*, 2 Str. 1217. *Roffey v. Greenwell*, 10 Ad. & El. 222. So a note, payable when a king's ship shall be paid off, was held good in *Andrews v. Franklin*, 1 Str. 24. Byles on Bills, 69, 5th ed.

Knowles and *Atherton*, contra. When the declaration treats the agreement between the parties as a bill of exchange, and so avoids setting forth the consideration for it, it ought to appear that the instrument is a bill of exchange within the custom of merchants. The words "when realized" must have a meaning attached to them; and then the instrument is payable at ninety days after sight, or upon an event which may never happen. In *Carlos v. Fancourt*, 5 T. R. 482, Lord Kenyon said, (p. 485,) "It would perplex commercial transactions of mankind, if paper securities of this kind were issued out into the world incumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire whether these uncertain events would probably be reduced to a certainty."

[*Lord Campbell*, C. J. The cases establish that it is no objection that the time of payment is uncertain, if it must arrive.]

But it is objectionable to have two days of payment mentioned.

[*Erle*, J. Is there any authority for saying that a bill payable at sixty days after sight, or ninety days after date, is bad?]

The meaning of this instrument is, that it should be payable ninety days after sight, if funds were then realized; but if not, when funds were realized.

LORD CAMPBELL, C. J. I am of opinion that the rule must be made absolute. Unless the instrument set forth in the declaration is a good bill of exchange according to the custom of merchants, the necessity for setting out the consideration for the agreement is not obviated. If we could reject altogether the words "when realized," this instrument would be an unexceptionable bill; but how can we be justified in doing so when a reasonable meaning may be ascribed to them? They convey a request to the drawee to pay the bill when he is in funds. To what period is that event to be ascribed? There

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is no reason why it should not occur after the expiration of ninety days. The drawee is not to pay until he is in funds, and he might never be in funds; therefore the instrument is payable on a contingency. I also think that there is a very serious objection, even if the instrument is construed as a request to pay as soon as the drawee finds himself in funds, and, at all events, ninety days after sight, because the holder would be placed in great difficulty. He must present the bill for payment when it became due, otherwise the person from whom he received it would be discharged by his laches; and, consequently, a duty would be imposed upon him of presenting the bill for payment on two different days.

PATTESON, J. I was struck with the observation, that construing the instrument as a request to pay, though funds were not realized, would make it an accommodation bill. But I never knew a bill made payable on a day named, or sooner. If the drawer had meant to say that the time of payment should not be beyond ninety days after sight, he would have said ninety days after sight; the addition of the words "or when realized" is obviously for the purpose of extending the time of payment.

COLERIDGE and ERLE, JJ., concurred.

*Rule absolute to enter a verdict for the defendant on the first count.*¹

¹ Where a written instrument, though in the form of a bill or note, is made payable on a contingency, which renders it uncertain whether the acceptor or maker will ever become liable thereon, it is not regarded as a bill of exchange or promissory note. *Coolidge v. Ruggles*, 15 Mass. 387. *Tucker v. Maxwell*, 11 Mass. 143. *Cook v. Saterlee*, 6 Cowen, 108. *Atkinson v. Manks*, 1 Cowen, 691. *Worden v. Dodge*, 4 Denio, 159. *Nichols v. Davis*, 1 Bibb, 490. *Mershon v. Withers*, 1 Bibb, 503. *Smurr v. Forman*, 1 Hammond, 272.

Nor will the happening of the contingency cure the defect. *Hill v. Halford*, 2 B. & P. 413.

In *Stephens v. Blunt*, 7 Mass. 240, the

court held an instrument promising to pay by a certain time, "or when he completed the building according to contract," to be a promissory note, notwithstanding the contingent clause. But the principle above stated was clearly recognized, the decision resting on the ground that there was an absolute promise to pay on the day specified. The court probably considered the promise to be to pay at that time, or *sooner* if the contingency happened.

But if the ultimate liability of the maker or acceptor is certain, a contingency as to the time of payment will not destroy the character of the instrument as a bill or note. *Cooke v. Coleham*, Willes, 396; *a. c.* 2 Strange, 1217.

Fawcett v. The York and North Midland Railway Company.

FAWCETT v. THE YORK AND NORTH MIDLAND RAILWAY
COMPANY.¹

February 7 and 8, 1851.

Railway Company—Highway Crossing—Liability concerning.

Declaration stated that the railway of defendants crossed a public highway on a level, yet defendants, disregarding their duty and the statutes in that behalf, did not keep gates across the said highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of plaintiff, lawfully being on the highway near to the railway, at the point aforesaid, went and escaped from the highway into and upon the railway, and were, by a locomotive engine and train of carriages of defendants, run over and killed. Plea, that the horses were not lawfully on the highway at the time when, &c. It appeared that the horses, which were grazing in plaintiff's field, had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—

Held, first, that the road formed by the company was a highway, though the parish might not be bound to repair it.

Secondly, that defendants being required by their railway act, and by sect. 9 of stat. 5 & 6 Vict. c. 55, to keep the gates at the crossings constantly closed, the horses were, as against defendants, lawfully on the highway, and therefore plaintiff was entitled to recover.

CASE. The declaration stated, that before and at the time of, &c., to wit, on, &c., A. D. 1849, the defendants, then being the company established and incorporated in and by a certain act of Parliament, 6 & 7 Will. 4, c. 81, were the owners and occupiers of the railway, to wit, the York and North Midland Railway, which had theretofore been made and constructed by the defendants under and according to the provisions of the said act and other acts of Parliament relating thereto; and were also possessed of certain locomotive engines, carriages, and trucks, used by them, the defendants, for the carriage and conveyance of passengers, cattle, goods, and chattels in, upon, and along the said railway for hire and reward to the defendants in that behalf: that the said railway crosses a certain public highway, to wit, a public highway leading, to wit, from Burton Salmon, in the county of York, to and into the road leading, to wit, from Ferrybridge to the city of York, to wit, in the township of Burton Salmon, in the parish of Monk Frystone, in the said county of York, on a level: that after the passing of stat. 5 & 6 Vict. c. 55, on, &c., although neither the lords of the committee of her majesty's privy council, appointed for trade and foreign plantations, nor the commissioners of railways, ever made any order or gave any directions that any gate or gates should be kept closed across the said railway at the point where the said railway crossed the said public highway, instead of across the said highway, except during the times when carriages or engines, passing along the said railway, should have to cross such highway, yet the defendants, disregarding their duty and the statutes in that behalf, did not maintain good and sufficient gates across each end of the said highway at the point where the same is crossed by the said

¹ 15 Jur. 173.

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railway, and did not maintain gates at the said crossing of such dimensions and so constructed as, when closed across the ends of the said highway, to fence in the railway, and prevent cattle and horses passing along the said highway from entering upon the said railway whilst the gates were closed, and suffered and permitted certain gates, which had been theretofore erected and put up by the defendants across the said highway at the point where the same is crossed by the said railway, to be and the same then were broken, decayed, fallen down, and out of repair, and not of such dimensions and so constructed as aforesaid; and the defendants did not keep, or cause to be kept, gates across the said highway, at the point where the said railway crossed the said highway, shut and constantly closed across each end of the said highway during long spaces of time, amounting, to wit, to two months, the same then not being times when horses, cattle, carts, or carriages passing along the said highway had to cross the said railway, but therein respectively wholly failed and made default; and by reason of the several premises in this count aforesaid, divers, to wit, two horses of the plaintiff, of great value, to wit, 100*l.*, then lawfully being on the said highway, near to the said railway of the defendants at the point aforesaid, to wit, on, &c., went, strayed, erred, and escaped from the said highway, into and upon the said railway of the defendants, and were then, in and upon the said railway by a certain locomotive engine and train of carriages of the defendants then being and travelling in, upon, and along the said railway, run down and over, and killed and destroyed, and the plaintiff thereby lost his said horses, and the use and advantage of employing the same in and about his lawful business as a farmer and otherwise for a long time, to wit, thence hitherto.

Pleas — First, Not guilty. Secondly, that the said way which the said railway is, in the first count, alleged to cross on a level was not nor is a public highway, as in that count is alleged. Conclusion to the country. Thirdly, that the said horses were not, nor was either of them, lawfully on the said highway, in the first count mentioned, at the time they so went, strayed, erred, and escaped therefrom, as in that count is alleged. Conclusion to the country.

On the trial, before Wightman, J., at the Summer assizes at York in 1850, it appeared that, before the formation of the railway, the Great North road crossed its site nearly on the present level of the railway; near the point now intersected by the railway, on the west side of the turnpike road, was an occupation road, leading to fields; and on the east side there was a highway, leading to the village of Burton Salmon. The turnpike road is now carried over the railway by a bridge, and embankments of considerable height and length form approaches to the bridge; the highway from Burton Salmon was diverted at the end of it next the turnpike road, and it now runs into the turnpike road at the south end of the approach to the bridge. The railway company also formed a road from it, running parallel with the approach to the bridge, on a level with the railway, which it crosses, then runs through one of the arches of the bridge, and again runs parallel with the approach to the bridge, until it unites.

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with the turnpike road on the old level. By means of this last-mentioned road the inhabitants of Burton Salmon are enabled, when going north, to avoid the ascent and descent of the approaches to the bridge, and also to save a little in point of distance; and this road also forms the only communication with the occupation road. There was a gate on the level crossing near the point where it joins the old highway to Burton Salmon, and another gate under the arch, at the north end of it; near the former gate was a cottage, occupied by one of the servants of the company, whose duty it was to see that the gates were closed. The plaintiff's horses were grazing in a field belonging to the plaintiff, distant about three fourths of a mile north of the railway bridge, and they appeared to have leaped over the hedge of the plaintiff's field into another field, the gate between which and the turnpike road, leading from York to Ferrybridge, was open; they passed through that gate into the turnpike road, and went along the turnpike road towards the bridge, and thence into the new road running parallel to the approach to the bridge, leading to the level crossing, and passing under the arch, and through the gate under it, which was open, they got upon the railway, and were run over and killed. There was no evidence that the fences of the plaintiff's field were out of repair, or that the gate under the arch was insufficient. It was contended for the defendants, first, that the road which crossed the railway, on a level was not a highway, and therefore the liability of the company to place and maintain gates upon it did not attach; and, secondly, that the horses of the plaintiff were not lawfully upon it. The learned judge was of opinion that the road in question was an alteration of the old highway, and was part of it, and that the horses were lawfully upon it, as against the defendants. The jury gave a verdict for the plaintiff upon the issues on the first count, leave being reserved to move to enter a verdict for the defendants on both issues. In the following Michaelmas term,¹—

Joseph Addison moved for a rule *nisi* accordingly. First, the obligation of the railway company, by sect. 1 of stat. 2 & 3 Vict. c. 45, and sect. 9 of stat. 5 & 6 Vict. c. 55, is to make and maintain sufficient gates across highways, where they are crossed on a level. By sect. 23 of stat. 5 & 6 Will. 4, c. 50, no road or occupation way shall be deemed or taken to be a highway which the inhabitants of any parish shall be liable to repair, unless certain conditions shall have been complied with.

[*Lord Campbell*, C. J. That enactment does not say that it shall not be a highway, but only not a highway which the parish is bound to repair.

Erle, J. A road may be a highway, though the parish are not bound to repair it.]

Secondly, the railway company are not bound to make and maintain gates where the railway crosses an occupation road. Can the

¹ November 5, before LORD CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

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owner of land over which an occupation road passes throw a fresh burden upon the railway by dedicating it to the public?

[*Lord Campbell*, C. J. Would it not be so if the parish had adopted it?]

Thirdly, the verdict on the third plea should have been entered for the defendants. The horses were not lawfully on the highway; they had strayed by the default of the plaintiff, and were not passing along the highway. *Dovaston v. Payne*, 2 H. Bl. 527. The obligation imposed upon railway companies to keep the gates at the crossings closed was intended for the protection of persons using the road in an ordinary way; and they are not bound to keep such gates closed against cattle straying on the highway.

The court granted a rule *nisi* only on the third point.

At the sittings in Banc after Hilary term, 1851,¹

Knowles and *Corrie* now showed cause. The question is, not whether the horses were lawfully on the highway, because, by sect. 83 of stat. 6 & 7 Will. 4, c. 81, it was the duty of the railway company to keep the gates shut across the railway. This duty of the railway company is a public duty, and the horses, though not lawfully on the highway, would be entitled to the protection of having the gates shut. [They also referred to sects. 84 & 87 of stat. 6 & 7 Will. 4, c. 81.] In *Dovaston v. Payne*, 2 H. Bl. 527, the cattle, which were distrained damage feasant, may have been suffered by the owner negligently to wander on the highway; also, that was an action of replevin, and the party was only bound to repair his own fences. This action rests on a public obligation, to which the company is subject for the benefit of the public. So, in *Blyth v. Topham*, Cro. Jac. 158, the horses strayed into the common by the default of the plaintiff, and the digging of the pit there was lawful as against the plaintiff. In this case there was no default of the plaintiff. Further, if the horses could be considered as trespassing on the highway, they were not deprived of the protection of the law. In *Davies v. Mann*, 10 M. & W. 546; 6 Jur. 954, there was no plea traversing that the ass was lawfully on the highway; but if there had been, it would have made no difference, because Parke, B., said, 10 M. & W. 549; 6 Jur. 955, "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief." "The wrong-doer is not without the pale of the law for this purpose." *The Mayor of Colchester v. Brooke*, 7 Q. B. 339, 377; 9 Jur. 1090, 1095. And in *Barnes v. Ward*, 14 Jur. 334, the court of common pleas held that the fact of the plaintiff being a trespasser was no answer to an action brought for injury sustained by him from falling into a hole excavated by the defendant on his own ground so near a highway as to render the use of it unsafe to the public.

¹ February 7 and 8. LORD CAMPBELL, C. J., was at the sittings at *nisi prius*; on February 7, COLERIDGE, J., was in the central criminal court, and EARLE, J., was at chambers.

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February 8. *Watson and Joseph Addison*, contra. There is no difference between a private and a public obligation, as far as this action is concerned. The horses should be lawfully on the highway, otherwise the action is not maintainable. In *Davies v. Mann*, 10 M. & W. 546; 6 Jur. 954, and *The Mayor of Colchester v. Brooke*, 7 Q. B. 339; 9 Jur. 1090, the action was brought for injuries arising from acts of commission, and not acts of omission. In *Dovaston v. Payne*, 2 H. Bl. 527, there was a demurrer, on the ground that the plea to the avowry did not show that the cattle were lawfully on the highway; and Buller, J., said, p. 531, "There can be no doubt that the passing and repassing on the highway was traversable, for the question whether the plaintiff was a trespasser or not depends on the fact whether he was passing and repassing, and using the road as a highway, or whether his cattle were on the road as trespassers."

[*Patteson*, J. In *Dovaston v. Payne* the cattle were *prima facie* trespassing. In this case the railway company were *prima facie* the wrong-doers; they were bound to keep the gates shut at all times; whether the horses were lawfully on the highway or not, may be an immaterial issue.

Coleridge, J. The keeping of the gates shut is part of the condition on which the company are allowed to make their railway. May it not be a matter of public policy to protect the lives and limbs of all persons using the road, in whatever manner?

Patteson, J. If an owner of land allows his fences adjoining a highway to be out of repair, he cannot distrain cattle coming on his close from the highway. But this is not a question of trespassing on the railway; it is more a question of fact than of law, whether the horses were lawfully on the highway; they had not been put there wrongfully by the plaintiff.

Wightman, J. The fences of the plaintiff's field were good, and there was no neglect of the plaintiff in the gate of the other field being open; how do you make it out to be his fault that his horses escaped ?]

The horses were liable to be impounded. By sect. 74 of stat. 5 & 6 Will. 4, c. 50, if any horse shall be found wandering, straying, or lying, or being depastured on a highway without a keeper, the surveyor of highways is required to impound it. The right of the public in the highway is a right of passage. The owner of the soil of the highway might bring trespass against the owner of cattle wrongfully on the highway without his leave and license.

[*Wightman*, J. But if the owner of the soil did not object to the horses being there, could the railway company insist that they were trespassing ?

Patteson, J. I never heard of the owner of enclosed land through which a highway passed bringing such an action, and I do not believe that it can be maintained.

Wightman, J. Suppose a horse threw his rider on the highway, and a gate between the highway and the railway being open, it had got on the line and been run over by a train.]

Suppose the gate had been open to allow persons to pass, and before

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a reasonable time had elapsed to close it again, the horses had strayed on the railway.

[*Wightman, J.* That would have been an answer. But it must be taken, for the purpose of the present argument, that the gate was left open.

Coleridge, J. Suppose a person going along an occupation road which he has no right to use, and another person, not the owner of the soil, was to stop him, might he not bring an action of assault? Would not he be there lawfully, as far as a stranger was concerned, if the owner of the soil did not interpose? Could the owner of horses straying on the highway be indicted?]

Cattle straying on the highway are a nuisance to the public, and the legislature has forbid them to be there. Sect. 47 of stat. 8 & 9 Vict. c. 20, does not apply to this railway, because it was constructed before that act passed.

PATTERSON, J. I have no doubt in this case. The 83d section of stat. 6 & 7 Will. 4, c. 81, under which this railway was constructed, enacted, that where the railway crossed any public highway on a level, the company should erect and maintain gates across the railway, at the crossing, which should be kept constantly shut by some person to be appointed by the company. That was altered by sect. 9 of stat. 5 & 6 Vict. c. 55, which, after reciting that experience had shown that it was more conducive to safety that gates should be kept closed across the turnpike or other road instead of across the railway, enacted, that "such gates shall be kept constantly closed across each end of such turnpike or other roads in lieu of across the railroad, except during the time when horses, cattle, carts, or carriages passing along such turnpike or other road shall have to cross such railway." Horses and cattle are introduced in this enactment for the first time; they are not mentioned in sect. 71 of stat. 5 & 6 Will. 4, c. 50, nor even in the preamble of this enactment. But, be it observed, it is not said when cattle are lawfully passing along the road, but when cattle "passing along such turnpike or other road shall have to cross such railway." In this declaration an allegation of the horses, "then lawfully being on the said highway," is inserted, and there is an express averment that the defendants did not keep the gates across each end of the highway shut, and that by reason of that negligence of the defendants, the horses got upon the railway and were killed. It is contended, that the railway company are not liable to this action, because the owner of the soil over which the highway passed might have distrained the horses damage *feasant*, (which I never heard of, and do not believe could be done,) or, at all events, because the surveyor of the highways might have impounded them until the owner paid the sum of 1s. for each of them under sect. 74 of stat. 5 & 6 Will. 4, c. 50, which, be it observed, may be remitted if it is made to appear before the justices that the straying of the cattle arose from accident, and was not wilful; which shows that the enactment was intended to apply only in cases where the straying on the highway was by neglect of the owner. But supposing that

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they could have been distrained or impounded, I have yet to learn that there is any act which makes railway companies the conservators of the rights of the public in respect of the duties with which the surveyors are intrusted. The question comes to this — whether it can be said, as against the railway company, that the horses were unlawfully on the highway. I am clearly of opinion that they were not. I do not believe that it was necessary to put the word “lawfully” in the declaration, because sect. 71 of stat. 5 & 6 Will. 4, c. 50, and sect. 9 of stat. 5 & 6 Vict. c. 55, impose upon the railway company the duty of keeping such gates closed at all times, and of employing persons to attend to the opening and shutting of such gates, in order to avoid injury which may occur from any thing passing along the road, whether straying or not, getting upon the railway. I am, therefore, of opinion that the verdict in favor of the plaintiff was right.

COLERIDGE, J. I did not hear the argument of Mr. Knowles, and I will only say that I concur in what has been said by my brother Patteson, with this addition — I take the law as to the duty of railway companies concerning gates, where the railway crosses a turnpike road or other highway, to be contained in sect. 9 of stat. 5 & 6 Vict. c. 55, and there I find that “such gates shall be kept constantly closed,” except during the time when horses, cattle, carts, or carriages passing along it shall have to cross the railway. It is admitted that the gate in question was not closed, and that the time when it was open was not within the exception, and that in consequence thereof the injury was done; therefore the defendants were clearly wrong in the first instance, subject to the question whether the horses were lawfully in the highway. In one sense they were not, because the surveyor might perhaps have impounded them; but if he might have impounded them, it does not follow that they were unlawfully in the highway as against the railway company. The word “lawfully” in this declaration must be construed as between these parties; the railway company could not, unless authorized by the surveyor, take any steps to impound them, merely because they were contingently liable for injury if they got upon the railway.

WIGHTMAN, J. There is no dispute about the facts in this case. Mr. Addison has truly said that the question is, whether the railway company are bound to keep the gates shut as against wrong-doers; and he says that they are so bound, with this exception, where cattle are straying on the highway. But the only exception in sect. 9 of stat. 5 & 6 Vict. c. 55, is for the purpose of letting horses, cattle, carts, or carriages cross the railway. Therefore the duty of keeping the gates closed was incumbent upon the railway company at all other times; and if the horses were killed in consequence of the gates being open at any other time, it is immaterial whether they were straying or not. Then it is said, that, by the express terms of the issue, the defendants are entitled to succeed; but it seems to me that, under the circumstances in this particular case as against the

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railway company, it may be considered that the horses were lawfully in the highway, whatever might be the case in respect of the owner of the soil.

Rule discharged.

REGINA v. THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.¹

January 27 and 29, 1851.

Time of keeping Beer-house open — 3 & 4 Vict. c. 61 — Refusal of Magistrates to adjudicate.

The stat. 3 & 4 Vict. c. 61, s. 15, prohibits the keeping open of retail beer-houses after eleven o'clock at night, within any city, cinque port, town corporate, parish, or place, the population of which, according to the last census, does not exceed 2500, or after ten o'clock elsewhere, (except in London, &c.) H. was situate in three different townships; it had no peculiar local rights, nor did it maintain its own poor, but its population, although not returned in the census, was admitted to exceed 2500. One of the townships, C., had a population of less than 2500. A license was granted for a beer-house, described therein as being in H., in the township of C., and by the license the house was to be closed at ten o'clock:—

Held, upon a rule calling on magistrates to adjudicate upon an information for keeping this house open until eleven o'clock, contrary to the above statute, that it might be kept open until that hour.

The limitation of time for keeping a beer-house open is fixed with reference to the density of population, and the collection of inhabitants of the requisite number is the governing fact in the application of the statute.

Quere, if the information had been for infringing the license instead of the provisions of the statute.

THIS was a rule calling on Joseph Charlesworth, William Leigh Brook, and Joshua Moorhouse, (three of the justices of the West Riding of Yorkshire,) and William Earnshaw, to show cause why the said justices should not adjudicate upon a certain information exhibited before the said Joseph Charlesworth by one John Earnshaw, and heard before the said three justices on the 4th May last, against the said William Earnshaw, for keeping his house open for the sale of beer after the hour of ten in the evening of the 30th April, 1850, contrary to the stat. 3 & 4 Vict. c. 61.² The defendant's house was

¹ 15 Jur. 178.

² By the 15th section of that statute it is enacted, "That no person licensed to sell beer or cider by retail, under the said recited acts, 11 Geo. 4, & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, or this act, shall have or keep his house open for the sale of beer or cider, nor shall sell or retail beer or cider, nor shall suffer any beer or cider to be drank or consumed in or at such house at any time before the hour of five of the clock in the morning, nor after twelve of the clock at night, of any day in the week, in the cities of London or Westminster, or within the boundaries of any of the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, or Southwark, as defined by an act passed in the second and third years of his late majesty King William the Fourth, intituled, &c.; nor after eleven of the clock within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish, or place, the population of which, according to the last parliamentary census, shall exceed 2500, or within one mile, to be measured as aforesaid, from any polling place used at the last election for any town having the like population, and returning a member or members to Parliament; nor after ten of the clock in the evening elsewhere," &c.

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situated at Holmfirth, which did not maintain its own poor, and had no distinct local rights of its own, but its population exceeded 2500. Holmfirth was in three different townships, each of them maintaining its own poor separately, one of which was called Cartworth, with a population of less than 2500. The defendant's house was described in the license as being in Holmfirth, in the township of Cartworth, in the parish of Kirkburton, in the county of York, and by the license he was required to close his house at ten o'clock. The ground of the information was, that as the house was described as being in Holmfirth, in the township of Cartworth, and as Cartworth contained less than 2500 inhabitants, the time for closing the house was ten and not eleven, and that Earnshaw had kept it open till the latter hour. There was no mode of correctly ascertaining the population of Holmfirth, as by the census the returns were only made for the separate townships, but it was admitted that it contained more than 2500 inhabitants. On the hearing of the case the justices came to the following resolution: "That although there is no return of the census for Holmfirth, nor is it easily definable; and although it is not a parish or township maintaining its own poor, nor extra-parochial; yet, inasmuch as the part generally known as Holmfirth is believed to contain a population of upwards of 2500, and the defendant's house being within that part, (although in a township with a population of less than 2500,) the court has a doubt whether it might not be considered 'a place' upon the construction of the words of the 15th section of the 3 & 4 Vict. c. 61, and that section being penal, the benefit of the doubt is given to the defendant, and the court refuse to adjudicate, leaving the prosecutor, if he think proper, to apply to the court of queen's bench for a *mandamus*."

Pashley now showed cause. The question was, under which of the categories in the 15th section of the 3 & 4 Vict. c. 61, the defendant came. It was admitted that the house was situated within the township of Cartworth, and that Holmfirth contained more than 2500 inhabitants; but there were no means of ascertaining it by the parliamentary census. He relied on two grounds: first, that the court would not review the decision of the magistrates, even if they thought it wrong; and, secondly, that their decision was perfectly right. On the first head, *Reg. v. The Justices of the West Riding*, 1 Q. B. 624; s. c. 10 Law J. Rep. (N. S.) M. C. 137; and *Reg. v. The Recorder of Liverpool*, 1 L. M. & P. 682, which was the last case, and reviewed all the others, were authorities. The magistrates had clearly given a decision on the whole case. The question was, whether this house, being at Holmfirth, was within the second or the third class mentioned in the 15th section; whether it was within any city, cinque port, town corporate, parish, or place, the population of which, according to the last census, exceeded 2500, in which case it might be kept open till eleven o'clock; or whether it was situate elsewhere, in which case it could only be kept open till ten.

[*Erle, J.* Is there any thing in the statute to define the word "place" ?]

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The 20th section incorporates the interpretation clause of the 11 Geo. 4, & 1 Will. 4, c. 64.¹ If, therefore, Holmfirth were either a township, a hamlet, a vill, an extra-parochial place, or a place maintaining its own poor, provided it contained a population exceeding 2500, it would be within the terms of the act. A penal law ought to be construed strictly. *Jenkinson v. Thomas*, 4 T. R. 665. *Doe d. Richardson v. Thomas*, 9 Ad. & El. 556. *Proctor v. Manwaring*, 3 B. & Al. 145. *Henderson v. Sherborne*, 2 M. & W. 236; 1 Jur. 152. The magistrates had come to a right conclusion. The license for the retail of beer was given by the 1st section of the statute; and the question was, not whether the defendant had rightly obtained it, but whether, being possessed of it, he had broken the law? Even if the magistrates had granted the license improperly, yet no question could arise thereon as to what he afterwards did under it. There was no particular form of license required, as in the case of ordinary licenses to publicans, whereby their contracts with the public are defined. The objection of there not being direct evidence of the population would apply in many other cases; as, for instance, to a hamlet, for which also the parliamentary census makes no separate return.

* *Pickering*, in support of the rule. This application was made under the 11 & 12 Vict. c. 44, s. 5, and it was just the case contemplated by the statute, as the magistrates refused to adjudicate, and left the prosecutor to apply to this court if he thought fit.

[*Erle, J.* I think that the magistrates wished to have the decision of this court; and their judgment may be construed as if they had said, "The grounds for a conviction have failed, and we do not adjudicate. Let these be taken as the facts of the case; we are desirous of getting the opinion of the court thereon."]

The license taken out described the defendant's house as situate in the township of Cartworth, and the certificate of character was signed by six inhabitants of Cartworth, and the overseer's certificate was signed by the overseer of the poor of that township. The license expressly said that his house was to be closed at ten o'clock. The word "place" was not within the terms of the statute.

[*Erle, J.* A town corporate may have several parishes, as Norwich, which contains sixty, but if a beer-shopkeeper live there, he may keep his house open till eleven o'clock at night, because he is within a town corporate with more than 2500 inhabitants; it is not necessary to ascertain the parish to which he is rated.]

The fact of his taking this license in such terms is a direct admis-

¹ Stat. 11 Geo. 4, & 1 Will. 4, c. 64, s. 32, enacts, "That the words 'county or place' shall be deemed severally to include any county, riding, division of the county of Lincoln, hundred, division of a county, liberty, division of a liberty, county of a city, county of a town, city, cinque port, or town corporate; and the words 'division or place' shall be deemed to include any division of a county or riding, liberty, division of a liberty, county of a city, cinque port, or town corporate; and that the words 'parish or place' shall be deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor," &c.

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sion that the place to which it applies gives him the privilege of keeping his house open only until ten o'clock.

[*Erle, J.* What divisions of the country do persons who conduct the census make?]

That is regulated by the 3 & 4 Vict. c. 99.

Cur. adv. vult.

The following judgment was now (January 29) delivered by

ERLE, J. This was a motion for a rule to justices to adjudicate upon an information for keeping a licensed beer-house open till eleven o'clock at night. The justices refused to adjudicate, for the purpose of raising the point for the consideration of this court in a convenient form, but, at the same time, the facts on which they acted are stated; and, upon those facts, I am of opinion the justices were right in refusing to convict. In support of the information, it appeared that the license is for a house in the township of Cartworth, having a population of less than 2500, and by the license it is declared that the house is not to be kept open after ten o'clock. For the defendant, it appeared that the house was in a place called Holmfirth, having a population exceeding 2500. The place so called comprises parts of three townships, Cartworth being one, each maintaining its own poor separately; but it has no local rights peculiar to itself, being an aggregation of houses and inhabitants, which has received a separate name; and, being so, I think it is a place in which the house may be kept open till eleven o'clock, within the 3 & 4 Vict. c. 61, s. 15. The limitation of time for keeping a house open is fixed with reference to the wants of a dense population, and the enactment is an endeavor to give a description of the places in which the requisite degree of density may be expected to be found, rather than a precise definition; it resembles the enactment relating to towns in the railway acts, which received an exposition in *Elliott v. The South Devon Railway*, 17 Law J. Rep. (N. S.) Exch. 262; 2 Exch. 725. In the neighborhood of the metropolis the limit is midnight; in places where there is a large population, it is eleven, and elsewhere ten. The collection of inhabitants of the required number, in a place having a name denoting such collection, is the governing fact, and no regard is had to the maintenance of the poor, or the appointment of the constable, or any such matter. The definition of "place," in the interpretation clause in the 11 Geo. 4 & 1 Will. 4, c. 64, s. 32, throws no light upon the subject, as it varies its meaning according to the words that accompany it; and in the section now under consideration, two words, capable of giving it different meanings, accompany it, viz., "town corporate" and "parish." The section relating to the grant of a license refers to neighbors jointly rated to the poor, but the enactments defining the neighbors who may guaranty the fitness for a license are wholly unconnected in meaning with sections regulating the houses of accommodation, which may be requisite. The reference to the parliamentary census does not assist us; for although

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Holmfirth is not separately mentioned in that census, still it is to be gathered from the statute that other places, which are not so mentioned, are capable of giving the right to keep open a house to the later hour. Lastly, as this is not an information for infringing a license, the terms of it, restricting the defendant to the hour of ten, are of no validity to support the information; therefore the rule must be discharged, with costs.

Rule discharged, with costs, accordingly.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER HILARY TERM, 14 VICT., A. D. 1851.

THORNE & another v. SMITH.¹

January 17, 1851.

Promissory Note, joint and several Payment — Pleading — Evidence.

An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note.

A joint and several promissory note had been given by the defendant and K. to the plaintiffs. K. agreed with L. and the plaintiffs that the plaintiffs should take L.'s promissory note in satisfaction of the defendant's liability on his joint and several note. The plaintiffs, having taken L.'s note on that understanding, received payment of it from R., authorized by L. to pay it:—

Held, that in an action on the first note, the above facts might be given in evidence under a plea alleging payment by the defendant.

DEBT by the plaintiffs, as payees, against the defendant, as maker of a promissory note for 100*l.*, payable on demand.

Plea — Payment by the defendant before action brought.

The action was brought to recover 30*l.*, being the balance alleged to be due from the defendant to the plaintiffs on a joint and several promissory note of the defendant and one Kench, dated the 14th of September, 1848. At the trial, before Cresswell, J., at the sittings in Middlesex, in Michaelmas term, 1850, the defendant began and proved the following facts: In the year 1848, Kench, a publican, the other maker of the note in question, applied to the plaintiffs, who were brewers, to advance him 100*l.*, in order that he might be able to take a public house, called the Joiners' Arms. The plaintiffs advanced that sum on receiving the note in question, the defendant having under-

¹ 20 LAW J. REP. (N. S.) C. P. 71.

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taken to become surety for Kench to that amount. Kench, finding that the business did not succeed, applied to the plaintiffs to assist him in getting rid of the house. They accordingly, in April, 1850, introduced him to one Lowe, to whom Kench transferred the business, Lowe undertaking to pay 100*l.* to the plaintiffs. On the 29th of April, 1850, Lowe gave the plaintiffs a promissory note for 100*l.*, payable on demand. Shortly afterwards, Lowe transferred the house to one Russell, who paid the amount of Lowe's promissory note to the plaintiffs. Both notes remained in possession of the plaintiffs, who produced the first note with an indorsement on it of "70*l.* paid." When Kench retired he was indebted to the plaintiffs in 30*l.* for his beer account, and the plaintiffs contended that they were entitled to appropriate, and had appropriated, 30*l.* out of the 100*l.* paid by Russell upon Lowe's note to the payment of that beer account, and that 30*l.* still remained due upon the note. Kench and Lowe, however, being called by the defendant, both stated that it was agreed by Kench and Lowe and the plaintiffs, that Lowe's note was to be taken by the plaintiffs in exoneration of the defendant's liability upon the first note. The learned judge asked the jury whether they thought that the understanding between the parties was, that the proceeds of the second note were to be applied to the general credit of Kench, or to the discharge of the defendant. The jury having replied, that they thought the latter was the case, the learned judge, being of opinion that the defence was not open upon the plea of payment, directed a verdict for the plaintiff, giving the defendant leave to move to enter a verdict.

A rule having been obtained accordingly, and for a new trial, on the ground that the verdict was against the evidence, —

Collier now showed cause. The direction of the learned judge was right. Such a complicated series of arrangements as this cannot be given in evidence under a general plea of payment. There was no privity between the plaintiffs and the defendant, as regards the payment of Lowe's bill. Even supposing that this might be treated as a payment by Kench, it is not a payment by the defendant. *Whitcomb v. Whiting*, Dougl. 652, only decided that the acknowledgment of one of several makers of a promissory note was sufficient to prevent the operation of the statute of limitations as against the others; but there is no decision that payment by one may be pleaded as payment by the others. *Griffiths v. Owen*, 13 Mee. & W. 58; s. c. 13 Law J. Rep. (N. S.) Exch. 345, shows that merely giving a bill is not admissible under a plea of payment. There was no appropriation by Russell when he paid the second bill, so as to make his payment a payment of the first. There is no finding by the jury that the defendant paid. *Phillips v. Warren*, 14 Ibid. 379; s. c. 14 Law J. Rep. (N. S.) Exch. 280, is an authority for the plaintiff. There it was held that payment by another person is not evidence of payment by the acceptor.

[*Maule, J.* In *Phillips v. Warren*, the person who got the bill had the right of suing on it; the debt was not there extinguished.]

He also cited *Price v. Price*, 16 Ibid. 232; s. c. 16 Law J. Rep. (N. S.)

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Exch. 99, and *James v. Williams*, 13 Mee. & W. 828; s. c. 14 Law J. Rep. (N. S.) Exch. 220, and contended that the verdict was against the evidence.

Mac Oubrey and *Kettle*, in support of the rule. This payment of Lowe's bill by Russell, with the facts that Lowe's bill was accepted from Kench by the plaintiffs on account of Kench and Smith's bill, and in exoneration of Smith, amounts to payment by Smith. *Phillips v. Warren* is not in point; the payment there was by an entire stranger. The plaintiffs themselves admit that the payment by Russell was a payment by the defendant as far as the 70*l.* was concerned. *Sinclair v. Baggaley*, 4 Ibid. 312; s. c. 7 Law J. Rep. (N. S.) Exch. 305, and *Smart v. Nokes*, 6 Man. & G. 911; s. c. 13 Law J. Rep. (N. S.) C. P. 79, were also cited.

JERVIS, C. J. The rule must be absolute to enter a verdict for the defendant. The verdict does not appear to be unsatisfactory in the opinion of the learned judge; therefore, the rule for a new trial will be discharged. The facts of the case appear to be that Kench, one of the joint and several makers of the note, being anxious to relieve the defendant, the other maker, procures a note to be given to the plaintiffs by Lowe, in satisfaction of the joint and several note made by him, Kench, and the defendant; and that afterwards Lowe's note is paid by Russell, who hands the amount to the plaintiffs, it being understood, as the jury find, that Lowe's note was given to the plaintiffs in order to exonerate the defendant from the joint and several note of himself and Kench. It is clear that, if Kench had paid the first note, that would have been a good defence under this plea. But it is equally clear that Kench constituted Lowe his agent to give the second note in satisfaction of Smith's liability on the first; and that Russell, as agent of Lowe, pays the amount of the second note to the plaintiffs. If these facts had been specially pleaded, it would merely have been a circuitous mode of alleging that the note was paid by Smith.

MAULE, CRESWELL, and WILLIAMS, JJ., concurred.

Rule absolute to enter a verdict for the defendant.

PRICE & another v. MOULTON.¹

Hilary Term, January 16, 1851.

Merger — Pleading.

To the sum of 3000*l.*, parcel, &c. of an *indebitatus* count in debt, the defendant pleaded a subsequent agreement to deliver to the plaintiffs an indenture of covenant to pay the said

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sum of 3000*l.* on a certain day, and that the defendant, in pursuance of such agreement, did, with the consent and at the request of the plaintiffs, execute and deliver to the plaintiffs such indenture, and did thereby covenant to pay the said sum of 3000*l.* Replication, that the said indenture was made by way of security for the payment of the said debt of 3000*l.*, and that it was always expressed by the said indenture that it was made as such security:—

Held, that the plea was a good plea of merger as to so much of the debt to which it was pleaded, and that the replication was no answer to it.

DEBT. The first count of the declaration was for breach of a deed of covenant to employ the plaintiffs as the agents of the defendant in the vending of certain goods. The subsequent counts were for money lent, for money had and received for interest, and lastly on an account stated. The defendant, amongst other pleas, pleaded, as to the sum of 3000*l.*, parcel of the moneys in the said last count of the said declaration mentioned, and the causes of action in respect thereof, “that heretofore, and after the accruing of the cause of action as to the said sum of 3000*l.*, parcel, &c., and before the commencement of this suit, to wit, on the 20th July, 1850, it was agreed between the plaintiffs and the defendant, that the defendant should sign, seal, and as his act and deed deliver to the plaintiffs a certain indenture between the defendant of the one part, and the plaintiffs of the other part, and thereby, amongst other things, covenant and agree with the plaintiffs, their executors, administrators, and assigns, that he, the defendant, his executors, administrators, or some or one of them, should and would well and truly pay or cause to be paid unto the plaintiffs or their assigns, or the survivor of them, or the executors, administrators, or assigns of such survivor, the said sum of 3000*l.* in the introductory part of this plea mentioned, at or in the common dining-hall of Lincoln’s Inn, in the county of Middlesex, on the 21st December, 1850, with interest for the same after the rate of 5*l.* for every 100*l.* for a year, to be computed from the day and year first aforesaid, without making any deduction or abatement for or by reason of any then present or future taxes, assessments, rates, or impositions, or other cause, matter, or thing whatsoever, the tax on property or income payable in respect thereof only excepted.

“And the defendant further saith, that, in pursuance of such agreement, and in performance of his part thereof, the defendant did afterwards, and before the commencement of this suit, and whilst the said sum of 3000*l.* was still due and unpaid as aforesaid, to wit, on the day and year last aforesaid, with the assent and consent, and at the request, of the plaintiffs, sign, seal, and as his act and deed deliver to the plaintiffs such indenture as aforesaid, (and which said indenture of mortgage, sealed with the seal of the defendant, being in the custody of the plaintiffs, the defendant cannot bring here into court,) and did thereby covenant to pay the said sum of 3000*l.* in the introductory part of this plea mentioned, with interest thereon after the rate aforesaid, upon and at the day and time and in the manner agreed as aforesaid, according to the true intent and meaning of the said agreement, as by the said indenture appears; whereupon, and by the virtue and effect of which said indenture, the said cause of action in the said last count mentioned, so far as the same relates to

the said sum of 3000*l.*, parcel, &c., became and was wholly merged and extinguished in law: and this the defendant is ready to verify," &c. Replication thereto, that the said indenture in the last plea mentioned was made by way of security for securing the payment of the said debt of 3000*l.* in the introductory part of the said last plea mentioned, and that it always was and is in and by the said indenture expressed, that the said indenture was made as such security as aforesaid; and the plaintiffs bring into court here the said indenture, sealed with the seal of the defendant; and this the plaintiffs are ready to verify, &c. Special demurrer to the replication, on the grounds that, if it is a traverse thereof, it is wrongly concluded, and should have concluded to the country; that it seeks to vary the effect of the deed by parol; that it states the effect or supposed effect of the deed, without setting forth the same, either on oyer or by enrolling it, or praying its enrolment; that it raises a question of law for the jury; that no issue, in fact, can be taken thereon; that it is not sufficient to say that the said indenture was made as a security for securing payment of the said sum of 3000*l.*, but that the said replication should have stated and shown that the original debt was to remain, and not be merged and extinguished; and how it was to remain, and not be merged and extinguished; and also for that the said replication is an argumentative traverse of the agreement stated in the said last plea; and also for that it is not directly alleged that there was an agreement that the said deed should be such security as alleged; and also for that the expression made by way of security is vague, ambiguous, and of uncertain legal meaning, and that it is not shown that the same was sealed, delivered, or executed with such intent as alleged, nor accepted by the plaintiffs with such intent as alleged.

Willes, in support of the demurrer. The replication is clearly bad. The question is, whether the meaning of the replication is not the same as alleged in the plea, namely, that the indenture was given to secure the same identical debt; because if it had been given to secure the same original simple contract debt, the latter would have become merged in the higher security, and this would have been the case independent of any intention of the parties to the contrary.

Dowdeswell, contra. Either the replication is good, or the plea is bad. It is wrong to say that, in every case where a deed is given for a simple contract debt, the latter must be merged. It is a question always what was the intention of the parties at the time the deed was given, whether it was to be given as a collateral security or not. *Twopenny v. Young*, 3 B. & Cr. 208. *Yates v. Aston*, 7 Jur. 83; 4 Q. B. 182. *Allenby v. Dalton*, 5 L. J., Q. B., 312. In *Holmes v. Bell*, 3 Man. & G. 213, where a banker took from a customer and his surety a bond conditioned for payment of all sums advanced or thereafter to be advanced to the customer, that was held no merger of the simple contract debt. There is a difference as to merger between estates and debts, and, as regards the latter, the intention of

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the parties is looked to, and if the deed was intended only to be given as a security for the debt, and not in satisfaction of it, there is no merger by its being so given.

[*Williams, J.*, referred to *The Norfolk Railway Company v. M'Namara*, 3 Exch. 628.]

The plea is bad; it does not allege that the plaintiffs accepted the deed. It is not sufficient unless the delivery of the deed be accompanied by an acceptance in satisfaction. *Crisp v. Griffiths*, 2 C. M. & R. 159.

[*Maule, J.* There the plea was pleaded as a plea of accord and satisfaction, which is not the case here.

Jervis, C. J. The plea here states that the deed was delivered with the assent and consent of the plaintiffs.]

Still it is submitted that that is not equivalent to an acceptance.

Willes, in reply. It is apprehended that the same rule which governs merger in respect to realty applies to cases of personalty; there is no authority for establishing a different rule. In Com. Dig., "Pleader," 2 G. 12, it is said, "So to an *assumpsit* the defendant may plead a bond given to him for the money demanded; for the bond determines the contract;" for which is cited Cro. Car. 415.

[*Cresswell, J.* Suppose a debt to be 5000*l.*, and there is a merger as to 1000*l.*, part of it, do you say that the other 4000*l.* are gone?]

It may be so unless the parties provide for it, but it does not affect the question in the present case, because the common counts are ambiguous; there may be several debts, or only one debt. The defendant may, therefore, if he likes, treat any portion of the money mentioned in the common count as the entire debt, and the *onus* is cast on the plaintiffs to show by replication that the sum so selected by the defendant is a portion of a larger debt. With respect to the plea not stating that the plaintiffs accepted the deed, it does state that the defendant delivered at the request of the plaintiffs, so that the plaintiffs took it into their hands with their assent, and it would be too late for them then to say that they did not accept it. *Crisp v. Griffiths* has not been approved of by subsequent cases, and ought to be reconsidered.

JERVIS, C. J. The unusual form of the plea at first created in my mind some doubts as to its validity; but I think that it is a good answer as to so much of the debt as it is pleaded to, and that the replication to it is bad, and consequently that judgment should be for the defendant. If the objection to the plea is, that it seeks to extinguish a larger sum by the extinguishment of a smaller, it should be shown that such is the case by the replication, as was correctly answered by Mr. Willes. Then the plea, being pleaded as to 3000*l.*, parcel, &c., states the execution and delivery to the plaintiffs of a deed of covenant for the payment of such sum of money. The replication does not deny the legal effect of the deed, or that it was so executed, but says that it was made by way of security for the payment of the debt. The replication is, in truth, only a repetition

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of the allegations in the plea; and if the plea is good, the replication is no answer to it. Now, the general rule is, that the giving of a higher remedy merges the lower remedy for the debt, and it lies on the plaintiffs to distinguish the present case from such general rule. They have failed to do so. The case of *Holmes v. Bell*, at first sight, seemed an authority to establish, that the giving of a bond for payment of a debt was not a merger of the debt; but upon examination it will be found, that the reason that the action was there maintainable was because there was no debt due before the bond was given, and, therefore, no extinguishment. The same answer may be given to *The Norfolk Railway Company v. M'Namara*. There, Parke, B., says, "Looking at the terms of the instrument, the parties could never have supposed it a security for the amount due, or thereafter to become due." But he adds, "If this had been the case of a bond or covenant for the identical debt, the plea would have been a good answer, without the additional allegation, that the instrument was given in satisfaction." Now, according to the construction I put on the present plea, the covenant is given for the payment of the identical debt to which it is pleaded, which brings the case within the latter part of Mr. Baron Parke's judgment. I therefore think that the plea is good.

MAULE, J. I think the replication, stating that the deed was made as a security for the payment of the debt, does no more than say that the deed was given as a remedy for the payment of the debt. If so, it does not merge the debt, but the remedy of proceeding for it on the simple contract. The replication amounts, therefore, to a mere nullity, and is no answer. The question turns, then, on the validity of the plea. I think that one cannot have, in respect of the same demand, a coëxisting remedy, by proceeding both on covenant and on simple contract; the remedy that exists is the higher remedy, namely, covenant. The policy of the law is, that there should not exist two remedies in respect of the same demand. Without, therefore, relying on the argument of merger in realty, I am of opinion that this plea, though it is not free from difficulty in conjecturing what is its object, is a good answer to this action.

GRESSWELL, J. I am of the same opinion. The unusual form of the plea seemed as if it had been framed to conceal some defect.

WILLIAMS, J., concurred.

Judgment for defendant.

Doe d. Blakiston & others v. Haslewood & another.

DOE d. BLAKISTON & others v. HASLEWOOD & another.¹

Hilary Term, January 30, 1851.

Will — Construction — Intention — Limitation to a posthumous Child.

A testator, by his will, devised an estate to his wife for life, with remainder in fee to his nephew, with a proviso, that in case the testator's wife should at his decease be pregnant with a child, the devise to the nephew was to cease, and such child was to take the remainder in fee. At the time of making his will the testator had no child, and he was expecting to die; but a child was afterwards born in his lifetime, and the testator made a codicil to his will, devising after-acquired property to such child. The wife was not *en ventre* at the death of the testator: —

Held, that the child born in the testator's lifetime had no estate under the will, and that, as there was no posthumous child, the devise to the nephew took effect.

The case of *White v. Barber*, 5 Burr. 2703, is not law.

THIS was an action of ejectment brought to recover the freehold estate, situate at Fishburn, in the county of Durham, called "The Falls," which is mentioned in, and devised by, the will hereinafter referred to. The defendants pleaded not guilty, and entered into the usual consent rule. The cause came on for trial at the last Summer assizes for the county of Durham, before Cresswell, J., when the plaintiff was nonsuited, subject to the opinion of this court upon the following case: Gilbert Trotter, of Fishburn aforesaid, yeoman, being at the time of making his will, and thenceforth to the time of his death, seized in fee of the property in question, made and published a will on the 18th January, 1787, executed and attested in the manner required by law for passing real estates by devise. At the time of making his said will the testator was a married man, (his wife's name being Elizabeth,) but he had then no child or children. He had not been long married, and evidence was given at the trial, that at the time of making his said will he was very ill, and thought he was going to die. The evidence of the facts of the testator being ill, and thinking he was going to die, was objected to on the part of the plaintiff; and the learned judge received it, subject to the opinion of this honorable court. After making his said will, the testator purchased the lands recited in the codicil hereinafter mentioned to have been so purchased by him, and situate in the township of Trindon, in the county of Durham, and on the 3d July, 1799, he made and published a codicil to his said will, executed and attested in the manner required by law for passing real estates by devise. Between the date of the will and the date of the codicil, that is to say, on the 1st June, 1789, the testator's daughter and only child, Elizabeth Trotter, who is mentioned in the codicil, was born. Her mother was the said Elizabeth, who also survived the said testator, and is after mentioned as his widow. On the 18th April, 1809, the testator died, without having altered or revoked his said will and codicil, or either of them, save so far as the codicil may have affected the will, leaving his said widow and his said daughter, and also his nephew, Gilbert Robson, who is

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mentioned in the will, surviving him. On the death of the testator, in 1809, his said widow, Elizabeth, entered upon and took possession of the Fishburn estate, and enjoyed it to the time of her death, which occurred on the 31st July, 1834. The two female lessors of the plaintiff are the co-heiresses at law of the testator's said nephew, Gilbert Robson, who died intestate on the 10th December, 1845. The defendants are the devisees in fee of Elizabeth Trotter Thompson, who was the daughter and heiress at law of the testator's said daughter, Elizabeth Trotter. The said Elizabeth Trotter, having married Samuel Thompson, died in 1823, and the said Elizabeth Trotter Thompson died unmarried, in December, 1844. On the death of her said grandmother, in 1834, the said Elizabeth Trotter Thompson entered upon the said Fishburn estate, and enjoyed it till her death. The question for the opinion of the court is, whether, under the above circumstances, the testator's estate, called "The Falls," situate at Fishburn, passed by his will and codicil, or either of them, to his widow for life, with remainder to his said nephew, Gilbert Robson, in fee. If the court shall be of opinion that the said estate passed to the testator's widow for life, with remainder to his said nephew in fee, then the rule *nisi* which has been granted to set aside the nonsuit, and to enter a verdict for the plaintiff, is to be made absolute. If the court shall be of a contrary opinion, then the rule is to be discharged. The following are the material parts of the will referred to in the above case: "I give and devise unto my dear wife, Elizabeth Trotter, and her assigns, all that my messuage, house, and premises thereunto belonging, situate, lying, and being in Fishburn, and all those my freehold lands, tenements, and hereditaments situate, lying, and being in the township of Fishburn aforesaid, called and known by the name of 'The Falls,' to hold the same to my said wife, Elizabeth, and her assigns, for and during the term of her natural life; and, subject thereto, I give and devise all and singular my said messuage, house, and premises situate in Fishburn aforesaid, and all those my freehold lands, tenements, and hereditaments situate, lying, and being in the township of Fishburn aforesaid, and all and every other my freehold estate of what nature soever, or wheresoever, unto my nephew, Gilbert Robson, son of Thomas Robson, of the city of Durham, innkeeper, who intermarried with my sister Margaret, to hold the same unto my said nephew, Gilbert Robson, his heirs and assigns forever." The testator then bequeathed unto his nephews certain legacies, payable out of the said lands called "The Falls;" and then declared as follows: "But I do hereby declare, that in case my said wife, Elizabeth, should at my decease be pregnant with a child or children, that then, and in such case, all and every my devise to my said nephew, Gilbert Robson, of my said messuage and premises, and of my said freehold lands and premises, and my legacies of 30*l.* apiece to my said nephews, Thomas Robson, William Robson, and John Robson, shall totally cease, and shall not be raised and paid; and if it should so happen that the said Elizabeth, my wife, should be brought to bed of any such child or children after my decease, then I give all and singular the same messuage, lands, tenements, and hereditaments, so by me

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heretofore devised, to such one child, if more than one, as shall be a son, the elder of which to be preferred, as in seniority of age and priority of birth." It is not necessary to set out the codicil. In it the testator recited that, since the making of his will, he had purchased certain fields, and he thereby devised such fields to his wife for life, with remainder in fee to the testator's daughter, Elizabeth. The case was now argued by

Manisty, for the lessors of the plaintiff. It is submitted that, if the will stood alone, the nephew would be entitled to the estate in fee on the death of the widow. The sole event on which the devise to the nephew was to fail is pregnancy at the time of the death of the testator, and this is expressed in plain and unambiguous language. The case to be supported on the other side must go to this extent, that the will provided that, if a child should be born in the lifetime of the testator, the devise to the nephew was to cease; but this would be to alter what is expressed in the will, and the testator may well be supposed to have known that if he had a child born in his lifetime he would be able to have altered his will. The case of *White v. Barber*, 5 Burr. 2703, was relied on by the defendants at the trial, but in that case there was a clear perception of the intention of the testator, and what the court did was only to supply a defect in the expression of such intention. The cases of *Bootle v. Blundell*, 19 Ves. 502; *Driver v. Frank*, 6 Price, 41; *Boreham v. Bignall*, 14 Jur. 265; and *Bird v. Luckie*, 14 Jur. 1015, show that the courts are not to conjecture what the testator intended, but to construe the will according to the intention as collected on the face and from the language of the will; and, as said by Wigram, V. C., in *Boreham v. Bignall*, the court is "compelled to consider it not only with reference to the events which actually happened, but to those which might have happened, and are expressly provided for by the will." It is further submitted, that the will and codicil in this case must be read together as one instrument as of the date of the codicil, unless a contrary intention is shown; and that if there is such a contrary intention, the *onus* lies on the other side to show it. *Barnes v. Crowe*, 1 Ves. 486. *Hulme v. Heygate*, 1 Mer. 285. *Rowley v. Eytton*, 2 Mer. 128. *Doe d. York v. Walker*, 13 Law J. Rep. (N. S.) Exch. 153; 12 M. & W. 591. *Goodtitle v. Meredith*, 2 Mau. & S. 5.

Malins, Q. C., (*Knowles*, Q. C., and *Atherton* with him,) for the defendants. It is clear that the first object of the testator was to provide for his wife, and next for his nephew; but being recently married, and not knowing whether he might have any child or not, he says by his will, in effect, "If I shall have issue, they are to take in preference to the nephew." The testator, however, was then expecting death before he should have any child, so he provides for his issue in a particular way, and says, that if his wife shall be pregnant when he dies, the child which may be afterwards born is to have the estate. Even if there was no authority, the court ought to decide in favor of the defendants; but the case of *White v. Barber*, 5 Burr. 2703, is an express

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authority in point. There the testator, having one son, T. P., living at the time of making his will, devised to his wife until T. P. attained twenty-one, and then to him in fee; but if his wife should be *enceinte* with one or more children at the time of his decease, and T. P. should die without issue before twenty-one, such child or children then living, then he devised to his wife until they attained twenty-one, and then to such children in fee; but if T. P. should die without issue, and before twenty-one, or that such posthumous children, if any, should die without issue, and before twenty-one, then to his wife for life; remainder over to his nephews, in fee. The testator died, leaving two younger children, born in his lifetime, but not leaving his wife *enceinte*, and T. P. died a minor, without issue; and the court of king's bench held, that these two younger children were entitled to an estate in fee under the will, at their respective ages of twenty-one. Coleridge, J., in *Morall v. Sutton*, 1 Ph. 533. So, *Jaggard v. Jaggard*, Pre. Ch. 177, cited in Wms. Exors., is an instance where a child will be considered a posthumous child, although born in the lifetime of the testator. In this case, it is submitted, that the moment a child is born, the devise to the nephew is gone. There are many authorities to show that the court should not adhere to the strict meaning of the words, but should give effect to the testator's intention, a different state of things having arisen from what was contemplated by him at the time he made his will. *Meadows v. Parry*, 1 V. & B. 124; *Murray v. Jones*, 2 V. & B. 313; *Mackinnon v. Sewell*, 2 My. & K. 202, where the cases are reviewed and commented on by Lord Brougham. *Wilson v. Mount*, 2 Beav. 397, is to the same effect.

JERVIS, C. J. I am of opinion, in this case, that the nephew took an estate in fee after the wife's death, and that the rule must, therefore, be made absolute for entering a verdict for the plaintiff. There seems no difficulty as to the principle which ought to govern this case; the difficulty is to apply that principle. We must take it that there is a positive devise to the wife for her life, with remainder to the nephew in fee; and to construe the will in favor of the defendants, there must be shown to be an intention to defeat that devise. The rule is clear, that the intention must be apparent on the face of the will, and that there should be words used capable of carrying that intention into effect. It was assumed, on the argument for the defendants, that the testator was apprehensive of immediate death at the time of making his will, and that he then had no children. It was said that he contemplated not only his wife being *enceinte* and having a child, but the possibility of her having one at any time afterwards; but that is to suppose an intention different from that which was in the mind of the testator. The testator's intention at the time he made his will was to provide for a posthumous child; in the event contemplated, he says, "If I die leaving my wife at my decease pregnant with a child, then the devise in favor of my nephew is to cease." The defendants wish us to go away from that which was then the existing intention of the testator, and for us to infer that he intended by his will to provide for children born in his lifetime, if the event he

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then contemplated should not happen. But I cannot do so; for the testator knew that if a child should afterwards be born in his lifetime, it was competent for him, if he thought fit, to revoke his will. It seems to me, therefore, that the principal matter is wanting, which is the condition of the rule, namely, an intention. It was assumed, in the argument by the defendants, that there was such intention; but I think, that, taking into consideration the then present intention of the testator to make a provision for a posthumous child, the will shows a contrary intention to what the defendants assumed, and that it is unnecessary to speculate on what the testator might have done in another state of things. I cannot fail to see that this decision may be said to conflict with *White v. Barber*; but if it be necessary to depart from that case, I am prepared to do so, as I do not think that that case was correctly decided. In that case the court gathered the intention from the will, but they supplied a devise, deeming it impossible that the father would provide for a posthumous child, leaving children *in esse* unprovided for. That is, in my opinion, a direct violation of authority, and must be overruled. It is not necessary in the present case to consider the fact of the codicil, if the will has, as I think it has, the effect of excluding the child born in the testator's lifetime.

MAULE, J. I am of the same opinion, that the nephew is entitled to take under the devise in the will of his uncle. This is in a great measure opposed to the case of *White v. Barber*. That decision I understand in the sense in which Coleridge, J., understood it in *Morrall v. Sutton*, 1 Ph. 533. In *White v. Barber* the court inferred, from the relation in which the testator stood to the different claimants to the property, that it was in the highest degree improbable he should not intend to provide by his will for one of the classes, which, in their judgment, was nearer his affections than the nephew, who was clearly intended by the will to take in some event. I do not think that that is sound law. Unless we can find apt words to carry out the intention, however much we may be satisfied that it was the intention of the testator to do something, we cannot give effect to it. In the case of *White v. Barber*, the court, acting on what they considered to be the intention, did not construe what the testator had said, but they interpolated a devise such as they thought necessary for the purpose of executing that intention. The intention which they ascribed to him was, not to leave after-born children unprovided for. But suppose such an intention to be ever so clearly evinced; suppose a recital in the will of such intention; yet if there be no apt words used to provide for this, the answer will be *quod voluit non dixit*. Even if a testator had recited at the end of his will that he had provided for all his children, still, unless there were some words which could be construed to provide for them, the court could not give effect to his intention. The case of *White v. Barber* proceeded on erroneous principles, and it has little judicial authority in support of it. Mr. Malins assumed that the testator expected immediate death, and that he had provided in the expectation of that event only. It follows, then, that,

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however improbable it was that the testator should intend to give to a posthumous child only, there could be no pretence for supposing that he intended to provide for children born in his lifetime, for the instrument which he executed he expected would be called into operation only in the event of his so dying that he could leave no child but a posthumous one; so that there is no kind of presumption that he intended by the will to provide for a child after born which was not a posthumous child. On the contrary, it is clear that he did not entertain any such intention. The circumstances under which the will was made, so far from showing an intention to provide for all children, including posthumous and not posthumous, negative such intention. It is true that it does not show that the testator preferred posthumous children to children not posthumous; but it shows that there was no intention on his part, by this instrument, to provide for any but posthumous children. It is not impossible that the party drawing the will for him might have said to him, "Suppose you have a child in your lifetime;" and the testator might have answered, "If so, I can make a new will; at present I am providing for what is going to happen, my immediate death. I therefore make provision applicable to that state of things only." The testator leaves, in clear and unambiguous terms, whether he survives or not, the estate to his nephew, and there is nothing which takes it away from him. I clearly consider, that, in deciding in favor of the nephew, the court does not decide that the testator's family is provided for in the same manner as it would have been by the testator if the question had now been put to him, but that the court gives to the only instrument which shows what was the intention of the testator the only operation which the testator intended that it should have, however otherwise he might have intended to have provided under a different state of facts.

CRESSWELL, J. I thought the case of *White v. Barber* was an authority for the defendants, and I acted on it at *nisi prius*; but sitting here I am not bound by that decision, and I think that case is not law. A distinction may be taken, in one sense, between that case and the present one, that there it did not take away an estate previously given, but conferred an estate, whilst here it takes away the estate given to the nephew. But, however, the same question is to be disposed of under the present case as under that of *White v. Barber*, and the distinction, therefore, is immaterial. The question is, what effect the testator intended should be given to his will, and are the words used sufficient to accomplish it? Now, for the defendants to support the nonsuit, it must be argued, that by this instrument the testator intended, on any child being born in his lifetime, to take away the estate previously given to the nephew; but the circumstances show that he did not contemplate a child being born in his lifetime; had he thought of such, he might have made a very different will. And even if we were to imagine that the testator did intend to provide for all his children, I cannot say that the words used are sufficient to accomplish it. The rule, therefore, must be made absolute to enter a verdict for the plaintiff.

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WILLIAMS, J. I am of the same opinion. The will gives, in clear terms, an estate to the nephew, and the testator contemplates one event, and one event only, on which that estate is to be taken away from the nephew — namely, the testator dying leaving his wife *en-ciente*. That event has not happened, and therefore the devise to the nephew must take effect.

Rule absolute to enter a verdict for the plaintiff.

DICKSON v. ZIZINIA & another.¹

January 18, 1851.

Contract — Construction — Warranty — Implication — Expressum facit cessare tacitum.

An express warranty will not be extended by implication from other parts of the contract in which it occurs.

The declaration stated that the defendants sold to the plaintiff a cargo of corn then shipped at Orfano on board the O., at a certain price, including freight to Cork, Liverpool, or London; that it was agreed that the quality should be of a certain average, and that the corn had been shipped on board in good and merchantable condition. Breach, that it was not shipped in good and merchantable condition for the performance of the said voyage:—

Held, that it was a misdirection to ask the jury whether the corn was good and merchantable for a foreign voyage.

ASSUMPSIT. The declaration stated that, on the 19th of March, 1847, the plaintiff, at the request of the defendants, bargained for and agreed to buy of the defendants, and the defendants then sold to the plaintiff a certain cargo, to wit, the cargo of Indian corn then shipped at Orfano on board the *Ottoman*, &c., at the price of 56s. per quarter free on board, including freight, insurance to Cork, Liverpool, or London, as per charter party, calling at Cork for orders, &c., and that it was agreed that the quality of the said Indian corn was equal to the average of the shipments of Salonica that season, to wit, the season of 1847, and that the said Indian corn had been shipped, to wit, in and on board the said ship or vessel called the *Ottoman*, in good and merchantable condition; and in consideration that, &c., the defendants then promised the plaintiff that the quality of the said Indian corn was equal to the average of the shipments of Salonica, &c., and that the said Indian corn had been shipped, &c., in good and merchantable condition. Breach, that the said Indian corn had not nor had any part thereof been shipped, nor was the same or any part thereof at the time of the shipment thereof, or at any other time, in good and merchantable condition, or in a fit and proper state or condition to be shipped or put on board the said ship or vessel for the

¹ 20 Law J. Rep. (N. S.) C. P. 73.

performance of the said voyage, to wit, from Orfano aforesaid to Cork, London, or Liverpool aforesaid.

Second plea. That the said corn had been shipped, and the same and every part thereof at the time of the shipment thereof was in good and merchantable condition.

At the trial, before Wilde, C. J., at the sittings for London, in Trinity term, 1850, the contract set out in the declaration was proved. At the time the contract was entered into, the 19th of March, 1847, the vessel was on her passage. The corn was shipped on the 19th of February, and the vessel sailed the next day. The ship met with rough weather, and was obliged on the 4th of March to put into Malta. It was then discovered, on opening the hatches, that the corn had become heated; and the captain, after taking proper advice, sold the cargo in order to avoid a total loss, realizing the sum of 630*l*. The action was brought for 3074*l*. 1*s*. 3*d*., the price of the cargo, which the plaintiff had paid according to the terms of the contract, and interest thereon.

The lord chief justice, in summing up, left two questions to the jury: first, whether the corn was at the time of shipment in a good and merchantable condition *for a foreign voyage*; and, second, whether it was in a good and merchantable condition generally for sale at the port of shipment. The jury declined giving an opinion on the last point, but found for the plaintiff on the first. A bill of exceptions was tendered, but was afterwards abandoned.

Greenwood, November 6th, obtained a rule *nisi* to set aside the verdict and for a new trial on the ground of misdirection.

Sir F. Thesiger and *Bramwell* now showed cause. It must be taken that the jury found that the corn was not in a good and merchantable condition for a foreign voyage, and the question is whether the contract contains an undertaking on the part of the defendants that it was. It is not necessary in this case to consider any extrinsic matters in order to construe the contract, because it expressly states the purpose for which the corn was sold. It is submitted that by the words "good and merchantable condition" must be meant either that the corn was shipped in a good and merchantable condition for all purposes, or that it was in a good and merchantable condition in respect of the matter in hand between the parties. In either case the plaintiff is entitled to retain his verdict. The cases which may be cited on the other side, such as *Gray v. Cox*, 4 B. & C. 108; *Shepherd v. Pybus*, 4 Sc. N. R. 434; s. c. 11 Law J. Rep. (N. S.) C. P. 101; *Jones v. Bright*, 5 Bing. 533; s. c. 7 Law J. Rep. C. P. 213; *Chanter v. Hopkins*, 4 Mee. & W. 399; s. c. 8 Law J. Rep. (N. S.) Exch. 14; *Brown v. Edgington*, 2 Man. & G. 279; s. c. 10 Law J. Rep. (N. S.) N. P. 66, were all cases where a warranty was implied; but here the question is how far an express warranty is to be extended. The circumstances of the purchase, the nature of the thing bought, and the purpose for which it was bought, are apparent on the face of the contract, and therefore the lord chief justice was right in leaving the first question to the jury, and this rule ought to be discharged.

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Greenwood and *Bovill*, in support of the rule. The breach in the declaration first follows the words of the contract before set out, and then adds something in expansion of the contract, as if it were necessarily implied. The lord chief justice left the case to the jury as if the contract came within those cases in which a warranty has been implied that goods were fit for the purpose for which they were sold. The plaintiff himself has not declared on the contract as having that effect. There is no implied contract here, for there is an express warranty which cannot be extended by implication. There is no implied warranty on the sale of a specific chattel. *Burnby v. Bollett*, 16 Mee. & W. 644; s. c. 17 Law J. Rep. (n. s.) Exch. 190, is a recent authority to that effect.

[*Maule, J.* This is a case of construing an express warranty.] In *Ollivant v. Bailey*, 5 Q. B. Rep. 288; s. c. 13 Law J. Rep. (n. s.) Q. B. 34, the distinction is drawn between a known ascertained article and one not ascertained. The case of a manufactured article differs in this respect from that of another chattel. In *Parkinson v. Lee*, 2 East, 314, where there was a sale of hops by sample, and a warranty that the bulk answered the sample, it was held that there was no implied contract that the hops should be merchantable. In *Barr v. Gibson*, 3 Mee. & W. 390; s. c. 7 Law J. Rep. (n. s.) Exch. 124, Parke, B., said, that in the bargain and sale of an existing chattel, the law does not imply a warranty of its condition. *Smith v. Jeffries*, 15 Mee. & W. 561; s. c. 15 Law J. Rep. (n. s.) Exch. 325, is to the same effect. In *Owens v. Dunbar*, 12 Irish Law Rep. 304, the question was, whether a cargo of corn sold without warranty was to be held to have been impliedly warranted merchantable at the port of discharge, and it was decided that no such warranty could be implied. Many of the observations in that case are applicable to the present. Where a contract is required to be in writing, the court will not imply any term into it. According to the argument on the other side, even if there had been no express words of warranty, a warranty that the goods were in a good and merchantable condition must have been implied. If that be so, then the condition which is expressed, containing the words "at the time of shipment," limits the condition or warranty to that time. For these reasons the learned judge was wrong in leaving to the jury the question whether the corn was in a good and merchantable condition for a foreign voyage, and this rule should be made absolute.

MAULE, J. I am of opinion that the rule should be made absolute. The case depends upon the construction of the contract set out, and whether we look at the contract merely as it is stated in the declaration, or with reference to the state of things within the knowledge of both parties, I think that it has not the meaning which the lord chief justice put upon it. The question left to the jury was, whether the corn was in a good and merchantable state for the purpose of being conveyed a foreign voyage. Another question was, whether at the time of the shipment the corn was in a good and merchantable condition.

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Whatever may be the legal effect of the words used, these are the words of the contract. The jury did not find any thing respecting that question, but did find upon the first question. They said that the corn was not in a good and merchantable condition, whether for the purpose of the voyage in question or for any other voyage I forget; but that is immaterial, because I think that the true construction of the contract is, that the corn was warranted to be good and merchantable simply. If, without looking at the extrinsic facts of the case in respect of which it is said that the parties may have contracted, we limit ourselves to the declaration, it says that there was a sale of Indian corn, which had been shipped at a certain place on board of a certain vessel, with the intention of its being carried to certain ports in England or Ireland by that vessel. Then come two special stipulations; the first respecting the quality of the corn, in which it is said, that the quality shall not be inferior, but equal, to the average of corn shipped that year at Salonica. It is further stipulated, that at the time of the shipment the corn was in a good and merchantable condition. One stipulation respects the quality of the corn, the other regards its being good and merchantable at the time of shipment. Now, these words would be sensible if they had no reference to the voyage or to the purpose to which the corn was destined. It is said, that although the words themselves make an intelligible contract, yet, as it appears on the face of the contract that the goods were to be sent to Cork, that makes it necessary to construe the general provision as a special one. Now, I do not think that there is any necessity for doing so. It may well be that a person, although he knows the purpose for which goods are shipped, may be satisfied with their having certain qualities, and yet a judicious party would not say on examination that they were good and merchantable for the purposes intended. The ordinary construction must be adopted, and we cannot have recourse to another construction which might be derived from other parts of the contract. The ordinary construction must be one which is attended with some inconvenience before the court would be entitled to have recourse to another sense. I think that the proper mode of construing the stipulation in this case is, to hold it quite independent of the voyage for which the corn was shipped. It may well be, consistently with the language used by the parties, that no condition of the corn of the average of Salonica, of the year 1847, would be such that it could arrive in good condition at Cork. The plaintiff has taken that risk on himself. He stipulates for a certain quality and a certain condition, and it is his own speculation to send the corn to Cork. Several cases have been cited about implied warranties. There are two answers to the application of those cases; first, that no warranty is implied in the sale of a particular chattel; and the other, that the parties have in this case expressed the warranty in the words which they are to be bound by. It would be most mischievous to superadd a tacit condition relating to a circumstance provided for by the express words of the parties. If a man sold a horse and warranted it sound, and the vendor knew that it was intended to carry a lady, and the horse was sound, but

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was not fit to carry a lady, there would be no breach. So, with respect to any other warranty, the maxim to be applied is, "expressum facit cessare tacitum." Were the law otherwise, it would very much infringe on the liberty of parties making contracts. It would in such case be necessary to express that it is not intended to go beyond the language employed. I think, therefore, that the contract was not properly construed, and that the case must go down again for trial.

WILLIAMS, J. I am of the same opinion. I think there is no legal principle and no circumstance in the case which should make us extend the warranty. In my opinion, the corn might have been shipped in a good and merchantable condition, although it could not be said that it was fit for a foreign voyage. Therefore, the question put to the jury does not dispose of the case, and I think for that reason there should be a new trial.

TALFOURD, J., concurred.¹

Rule absolute.

KEATES v. CADOGAN.²

January 20, 1851.

Landlord and Tenant — Condition of Premises — Action on the Case — Deceit — Concealment.

Where the intended lessor of a particular house knows that the house is in a ruinous state and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee.

A declaration in case stated that the defendant, knowing that a certain house was in such a ruinous and dangerous state as to be dangerous to enter, occupy or dwell in, and knowing that the state of the house was unknown to the plaintiff, by agreement in writing demised the said house to the plaintiff, and the plaintiff agreed to take the same at a certain rent, the plaintiff having previously proposed to take the house for the purpose of immediately occupying and dwelling in the same; that the plaintiff commenced dwelling in the house without notice of its state, and so continued to the knowledge of the defendant: and that the defendant neglected his duty in not giving the plaintiff notice that the house was in the said state before entering into the said agreement, and before the plaintiff commenced occupying. That, shortly after the plaintiff commenced occupying, the house fell down; alleging special damage:—

Held, (on demurrer to the plea,) that this declaration was bad, there being nothing to show that the plaintiff was not to put the house into repair before he commenced occupying, and it not being alleged that he was induced by his belief of the soundness of the house to enter into the agreement, or that any misrepresentation was made by the defendant to the plaintiff as to the condition of the house.

Hill v. Gray, 1 Stark. N. P. 434, distinguished.

CASE. The first count of the declaration stated that whereas the defendant, before and at the time of the committing of the grievance

¹ JERVIS, C. J., was absent.

² 20 Law J. Rep. (N. S.) C. P. 76.

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by him as hereinafter next mentioned, was possessed of a certain dwelling-house, situate in the county of Middlesex, and which said dwelling-house, at the time of the committing of the said grievance and of the making of the proposal and agreement, and of the plaintiff becoming tenant to the defendant as hereinafter mentioned, and thence until the plaintiff entered into and occupied and dwelt therein as hereinafter mentioned, was in such a ruinous and dangerous state and condition as to be dangerous to enter, occupy, or dwell in, and was likely wholly or in part to fall down, and thereby do damage and injury to persons and property therein, and which the defendant then and during all the time aforesaid and hereinafter mentioned well knew. And whereas the plaintiff, without any knowledge, notice, information, or warning whatever that the said house was in the said state and condition, or likely wholly or in part to fall down, to wit, on the 20th of November, 1848, proposed to the defendant, that the defendant should demise to him, and that the plaintiff should take of him as his tenant for the purpose of the plaintiff immediately occupying and dwelling in the same, the said dwelling-house and also a certain yard adjoining to the same for the term of three years from the 29th of September, 1848, at a certain rent and upon certain terms to be agreed upon between them. That the defendant, well knowing the premises, to wit, on the 20th of November, 1848, by an agreement in writing then made between the defendant, by one Daniel Price Owen, his agent in that behalf, of the one part, and the plaintiff of the other part, agreed to demise and did demise to the plaintiff the said dwelling-house and yard for the said term of three years from the said 29th of September, 1848, at the yearly rent of 25*l.*, commencing from the day and year last aforesaid, payable quarterly, the first quarter to become due on the 25th of December, 1848, the plaintiff paying all rates, &c., and the plaintiff thereby also agreed with the defendant to take, and did thereby take, the said dwelling-house and yard for the said term, and to pay the said rent in manner aforesaid, and the said rates, &c. That the plaintiff thereupon then entered into and upon the said dwelling-house, and commenced occupying and dwelling therein. That for and during all the time aforesaid, and from thence until the happening of the injury, loss, and damage as hereinafter mentioned, he did not have any notice, knowledge, information, or warning whatever that the said house was in the said state and condition so as to be dangerous to enter, occupy, or dwell in, or that it was likely, wholly or in part, to fall down, and the defendant, for and during all the time aforesaid, well knew that the plaintiff had not any such notice, knowledge, information, or warning, and [believed¹] that he could, immediately after the making of the said agreement, enter into and upon, and occupy and dwell in the said house; and although the defendant could and might before the making of the said agreement, and also before the plaintiff so entered upon and commenced occupying or dwelling in the said house as aforesaid, have given or caused to be given to the

¹ Omitted in demurrer books.

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plaintiff notice, information, or warning that the said house was in the said state and condition, and likely wholly or in part to fall down, and although the defendant ought to have given or caused to have been given to the plaintiff notice, information, or warning of that fact, yet the defendant, not regarding his duty in that behalf, wholly omitted and neglected to and did not nor would at any time give or cause to be given to the plaintiff any notice, information, or warning whatever that the said house was in the said state and condition, and likely to fall down, but wholly neglected and omitted so to do, by means of which premises afterwards and shortly after the plaintiff had so entered into, upon, and commenced occupying and dwelling in the said house, and whilst he and his family were occupying and dwelling therein, and during the said term so granted to him therein as aforesaid, to wit, on, &c., a great part of the said house, by reason of its being in such ruinous and dangerous state and condition as aforesaid, fell down, and thereby became and was no longer habitable, and thereby the lives of the plaintiff and his family, occupying and dwelling in the said house, became and were greatly endangered, &c. Special damage to the plaintiff's wife, goods, and business.

Sixth plea, that it was not the duty of the defendant to have given, or caused to be given, to the plaintiff such notice, information, or warning as in the said first count mentioned, in manner and form, &c.

To this plea there was a demurrer.

Cleasby, in support of the demurrer. The plea is bad for putting in issue matter of law.

[*Needham* admitted that he could not support the plea.]

Then, the only question is, as to the sufficiency of the declaration. The defendant contends that the duty stated to have been neglected by him does not arise from the facts stated in the declaration. It is sufficient for the plaintiff to state facts showing that a good cause of action exists, even though the duty alleged to have been neglected by the defendant may not be correctly stated. *Parnaby v. The Lancaster Canal Company*, 11 Ad. & E. 223, 230; s. c. 9 Law J. Rep. (n. s.) Exch. 338. The facts here stated show a good cause of action. A person letting a house to another, knowing that the other takes it for the purpose of residence, and knowing that it is in a dangerous state and likely to fall down, and that the other takes it not knowing that it is in this state; gives a cause of action to the party taking the house. It is a concealment which amounts to a deceit. This is not the case of a small defect, but it is such a state of things as must, if known to the plaintiff, have prevented him from taking the house for the purpose for which he wanted it.

[*Maule, J.* Not if he could have repaired it at a small expense. He may have chosen to take this house without knowing any thing about it. If a man says to another, "Sell me a horse fit to carry me," and the other sells a horse which he knows to be unfit to ride, he may be liable for the consequences; but if a man says, "Sell me that gray horse to ride," and the other sells it, knowing that the former will not be able to ride it, that would not make him liable.]

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In *Hodgson v. Williamson*, 1 W. Black. 463, concealment of the true port of loading was held to vitiate a policy of insurance. The same principle upon which the court there acted applies to an action on the case for deceit for damage sustained by the concealment of a material circumstance. The circumstance here concealed is most material with reference to the object the plaintiff had in view in taking the house, which object was known to the defendant. In *Pilmore v. Hood*, 5 Bing. N. C. 97; s. c. 8 Law J. Rep. (N. S.) C. P. 11, the doctrine now contended for was acted upon; and the defendant was held liable, though he had made no representation himself, on the principle of *qui tacet consentire videtur*, because he knew that the representation had been made. In *Langridge v. Levy*, 2 Mee. & W. 519; s. c. 6 Law J. Rep. (N. S.) Exch. 137; affirmed in error, *Levy v. Langridge*, 4 Mee. & W. 337; s. c. 7 Law J. Rep. (N. S.) Exch. 387, at p. 532, the court say, "We decide that the defendant is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whom he knew it was purchased.

[*Jervis*, C. J. The foundation of the action there was the representation made.]

Concealment is equivalent to a representation. The real ground of the action was, that the defendant contemplated that the gun was to be used by the plaintiff, and did not disclose the fact that it was dangerous to use. So here; the house is let for residence, and the defendant does not disclose the fact that it is dangerous and unfit to reside in. He also cited *Cornfoot v. Fowke*, 6 Ibid. 358; s. c. 9 Law J. Rep. (N. S.) Exch. 297; and *Williams v. The East India Company*, 3 East, 192. In *Hill v. Gray*, 1 Stark. 434, the agent who had been employed by the plaintiff to sell a picture by Claude, refused to tell the defendant whose property it was, and permitted the defendant to purchase it under the erroneous belief (known to him, the agent) that the picture was the property of Sir Felix Agar. The plaintiff brought an action for the price of a Claude, and Lord Ellenborough nonsuited, saying, "Although it was the finest picture Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which he knew enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it." On the same principle, this contract was void at the option of the plaintiff; and the concealment here complained of being followed by damage, entitles him to succeed in this action.

Needham, contra, was not called upon.

JERVIS, C. J. I felt, for a moment, some difficulty, in consequence of the case which has been cited, *Hill v. Gray*; from the first reading of which, it would appear, that Lord Ellenborough had there decided, that merely allowing the vendee to purchase while laboring under a

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delusion with regard to the article purchased, was sufficient ground for setting aside a contract of sale under all circumstances, as against the vendor. But in that case there appears to have been a positive aggressive deceit. Lord Ellenborough says, "The agent ought not to have let in a suspicion on the part of the purchaser which he knew enhanced the price," and continues, "he saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it." Not removing that delusion might be taken as equivalent to an express misrepresentation. The difficulty arising from that case being disposed of, I do not think that this declaration discloses a sufficient ground of action. It is not contended that there was any warranty that the house was fit for immediate occupation; but it is said, that because the defendant knows it is in a ruinous state, and does nothing to inform the plaintiff of that fact, therefore the action is maintainable. It is consistent with the state of things disclosed in the declaration, that, the defendant knowing the state of things, the plaintiff may have come to him and said, "Will you lease that house to me?" and the defendant may have answered, "Yes, I will." It is not contended by the plaintiff that any misrepresentation was made; nor is it alleged that the plaintiff was acting on the impression produced by the conduct of the defendant as to the state of the house, or that he was not to make investigations before he began to reside in it. I think, therefore, that the defendant is entitled to our judgment, there being no obligation on the defendant to say any thing about the state of the house, and no allegation of deceit. It is an ordinary case of letting.

MAULE, CRESSWELL, and WILLIAMS, JJ., concurred.

Judgment for the defendant.

STEWART v. COLLINS.¹

January 20, 1851.

Pleading — Argumentativeness — Immaterial Issue — Deed of Arrangement — 12 & 13 Vict. c. 106, s. 224, 225.

A plea to a declaration in debt, after setting out a deed, which it alleged to be a deed of arrangement under 12 & 13 Vict. c. 106, between the defendant and his creditors, stated, that the creditors by whom and on whose behalf the same was sealed, were "more than six sevenths, to wit, nine tenths" in number and value of the creditors of the defendant, &c.:—

Held, (on special demurrer for argumentativeness, and for attempting to raise an immaterial issue, &c.,) that the plea sufficiently stated the deed to have been signed "by or on behalf of six sevenths of the creditors" within the meaning of sect. 225.

DEBT for goods sold and delivered, and on an account stated.

Pleas, first, as to all except 22l. parcel, &c., *nunquam indebitatus*;

¹ 20 Law J. Rep. (N. S.) C. P. 79.

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second, as to 22*l.* parcel, &c., and the causes of action in respect thereof, a plea to the further maintenance. This plea (after setting out a deed between the defendant and certain of his creditors, by which those creditors covenanted and agreed, amongst other things, not to sue the defendant for any of their debts until the 26th of February, 1852, and that the deed should operate as a release and might be pleaded in bar to any suit for such debts) stated, that the said indenture, at the time of the making thereof, and at all times, was a deed of arrangement between the defendant and his creditors within the meaning of 12 & 13 Vict. c. 106, and that the creditors by whom, and on whose behalf, the same was sealed as aforesaid, were *more than six sevenths, to wit, nine tenths* in number and value of the creditors of the defendant, within the meaning of the said statute, whose debts amounted, within the meaning of the said statute, to the sum of 10*l.* and upwards, accounting every creditor as a creditor in value in respect of such amount only as upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from the defendant, appeared to be the balance due to him. That the plaintiff was, at the time of making the indenture, a creditor of the defendant, in respect of the causes of action in the introductory part of the plea mentioned, and that the amount in the introductory part of the plea mentioned was then a debt due from the defendant to the plaintiff, within the meaning of the indenture. That after the signing of the indenture as aforesaid, the plaintiff had notice of the defendant's suspension of payment and of the said indenture, and was requested by the defendant to sign it as one of the parties of the third part. That three calendar months from the time when the plaintiff had notice of the said suspension and indenture had expired since the commencement of the suit. That the defendant had in all respects performed the covenants in the said indenture on his part to be performed. That the trustees appointed by the indenture had assented and acted. That by reason of the premises, and by force of the statute aforesaid, the said indenture, after the commencement of the suit and before the plea, became as obligatory on the plaintiff as if he had signed the same. That the time limited by the indenture had not yet elapsed; and that by reason of the premises and of the prosecution of the suit, the defendant heretofore and after the commencement of this action, to wit, on, &c., became and was released and discharged from the said causes of action in the introductory part of the plea mentioned. Verification, and prayer of judgment, &c.

To the second plea there was a special demurrer, assigning for causes, amongst others, that the plea did not directly allege that the deed therein mentioned was signed or executed by, or on behalf of, six sevenths in number and value of the defendant's creditors mentioned in that plea, within the meaning of sects. 224 and 225 of 12 & 13 Vict. c. 106; also that the plea was argumentative and tended to raise an immaterial issue.

S. Temple, in support of the demurrer. This plea is intended to

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raise a defence under the 224th section of 12 & 13 Vict. c. 106. The deed to which that section gives the effect of a release must be "a deed entered into between any such trader and his creditors, and signed by, or on behalf of, six sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards." The plea does not properly show that the deed relied upon was signed by, or on behalf of, six sevenths of the creditors. It alleges that it was signed by more than six sevenths, to wit, nine tenths. This averment, if traversed, would not be material or conclusive. If the plaintiff were to traverse it, by alleging that more than six sevenths did not sign, that would raise an immaterial issue. *Burroughs v. Hodgson*, 9 Ad. & E. 499; s. c. 8 Law J. Rep. (n. s.) Q. B. 113. *Parker v. Gill*, 5 Dowl. & L. P. C. 21. This is an argumentative statement that six sevenths signed.

[*Maule, J.* Would not a traverse that the deed was not signed by six sevenths of the creditors be sufficient?]

No; the plaintiff would be embarrassed in attempting to treat it so. He would not know whether to conclude to the country or with a verification.

Ball, contra. The plea is framed after the plea in *Phillips v. Surridge*, 19 Law J. Rep. (n. s.) C. P. 337, and the present objection was not there taken. The meaning of the statute is to be looked at; the intention of the legislature clearly is, that any number of the creditors, amounting to six sevenths at the least, shall, by signing such a deed, bind the rest. It would have been a good traverse to say in the replication that six sevenths did not sign.

[*Jervis, C. J.* Has not the plaintiff a right to take issue upon the allegation as made in the plea, and to say more than six sevenths did not sign? Then, suppose the jury found that issue in his favor, would it not be an immaterial finding?]

S. Temple replied.

The COURT, having offered *Ball* leave to amend on the usual terms, which was refused, delivered judgment.

JERVIS, C. J. I am of opinion that the defendant is entitled to our judgment. When it is considered that what the defendant is bound to do is, to state facts amounting to a defence within the act of Parliament, and that he does correctly state facts amounting to a defence, I think that there can be no doubt that this plea is sufficient. He is not bound to state in his plea that exactly six sevenths signed the deed. This is not an argumentative statement that six sevenths signed, but a substantive averment which might be traversed by the plaintiff, that six sevenths signed within the meaning of the statute.

MAULE, J. I also think that the defendant is not bound to call attention to the very words of the statute, but only to state matters of fact which amount to a defence; and I think that such a deed is

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a defence if it has been signed by nine tenths of the creditors, provided that nine tenths of the creditors amount to more than six sevenths, which I think they do. If the plaintiff wishes to deny any portion of that defence, he may do so; or he may state some matter in his replication inconsistent with that defence. If that inconsistent matter happens to be, in terms, a contradiction of some material allegation in the plea, the modern practice is to conclude to the country. In ancient times, when in a replication some one allegation in the plea was selected to be denied, the practice was to conclude to the court, and not to the country. This is shown in a note to a case reported by my brother Manning. *Wilkes v. Hopkins*, 6 Man. & G. 37, n. (d.) *Altwood v. Taylor*, 1 Ibid. 228, n. (a.) Now, here, if the true answer of the plaintiff to the defence set up in this plea would be, that the deed was not executed by, or on behalf of, six sevenths of the creditors, (which, I think, would clearly be a good replication,) and if he is desirous of stating such answer in his replication, then, according to the modern practice, he should conclude to the country. But if the plea is not so perfectly a statement that the deed has been executed by six sevenths, that a replication by traversing it in those words ought certainly to conclude to the country, it may be necessary for the plaintiff to employ a special traverse. However, I do not think that the defendant is to be considered to have pleaded a bad plea, merely because he has raised a doubt whether the plaintiff ought to conclude his replication to the court or to the country, or to traverse specially. He has stated facts which constitute a defence. If six sevenths had not signed, the plaintiff would be able to show that, and might have traversed that averment. The law of the case is probably not unconformable to the justice of it. I think that the plea is good.

CRESSWELL, J. I conceive that Mr. Temple would not go so far as to contend, that a deed signed by nine tenths of the creditors would not be a good defence under the statute; yet, I think, that, according to his argument, a plea alleging a deed signed by nine tenths would not be a good plea. The plea, in fact, avers, in substance, that the deed was signed by six sevenths and more.

WILLIAMS, J. No doubt the plea alleges certain facts more extensively than is necessary to constitute the defence; but that does not make it necessary for the plaintiff to traverse the whole of the averment in its extended shape. He must take care to narrow his traverse so as to meet what is the real defence.

Judgment for the defendant.

Nosotti v. Page.

NOSOTTI v. PAGE.¹

January 14, 1851.

Debt — Credit in Particulars of Demand — Damages.

In an action of debt the plaintiff, in his particulars, stated, "This action is brought to recover the sum of 1s. damages, for the detention of the debt for which this action is brought, together with the costs of suit; the debt, 86l. 9s., having been paid by the defendant to the plaintiff after action brought." The plaintiff having proved, at the trial, a debt of 69l., the verdict was held to have been properly entered for that sum, debt, and 1s. damages.

DEBT for goods sold and delivered, and on an account stated.

Plea — *Nunquam indebitatus*.

The particulars delivered with the declaration were as follows: "This action is brought to recover the sum of 1s. damages for detention of the debt for which this action is brought, together with costs of suit; the debt of 86l. 9s. having been paid by the defendant to the plaintiff since the action was brought."

At the trial, before Jervis, C. J., at the sittings in Middlesex after Michaelmas term, 1850, the defendant set up as his defence that the credit for the goods had not expired at the time of action brought. This defence was negatived by the jury, and the verdict was entered for 69l. debt, the amount proved, and 1s. damages, and the learned judge gave the defendant leave to move that the verdict be entered in conformity with the particulars, or to enter a nonsuit.

Keane now moved accordingly. The plaintiff ought to have been nonsuited. The particulars show a satisfaction of the debt for which the action is brought. *Beaumont v. Greathead*, 2 C. B. Rep. 494; s. c. 15 Law J. Rep. (N. S.) C. P. 130.

[Maule, J. There the payment was before action brought.]

Gell v. Burgess, 7 Ibid. 16; s. c. 18 Law J. Rep. (N. S.) C. P. 153.

[Maule, J. The plaintiff is clearly entitled to damages for the detention of the debt.]

Then the plaintiff was not entitled to any verdict for any debt until he had proved a debt larger than that for which he gave credit. He only proved a debt of 69l., and he gave credit for 86l. 9s. *Eastwick v. Harman*, 6 Mee. & W. 13; s. c. 9 Law J. Rep. (N. S.) Exch. 137.

[Maule, J. There the defendant had a verdict.]

It is submitted that the verdict ought to be entered according to the particulars; that is, for 1s. damages only.

[Jervis, C. J. You are asking for an entry which would be error on the record.

Maule, J. If execution is issued for more than the costs, you may apply to the court, but you must pay the costs.]

Per curiam,—

Rule refused.

¹ 20 Law J. Rep. (N. S.) C. P. 81.

 Addington & others v. Magan.

ADDINGTON & others v. MAGAN.¹

November 22, 1850, and January 21, 1851.

Variance — Special finding on Record — 3 & 4 Will. 4, c. 42, s. 24.

A plea of set-off stated that the plaintiffs authorized one G. W., trading as G. W. & Co., to sell the goods for the price of which the action was brought, as and for the proper goods of him G. W., and that he did so sell them; and that G. W. was indebted to the defendant, &c. The evidence was, that the plaintiffs authorized G. W. to sell the goods as and for the goods of G. W. & Co., which firm consisted of G. W. and L. S.:—

Held, that this was a material variance.

The jury having found the facts as above according to the evidence, and that finding having been indorsed upon the record:—

Held, that the court could not give judgment for the defendant "according to the very right and justice of the case" by section 24, of 3 & 4 Will. 4, c. 42, that power only being given to the court in the case of variances which they shall think immaterial to the merits of the case.

DEBT. First count, for 450*l.* for goods sold and delivered by the plaintiffs (trading under the firm of George Willis & Co.) to the defendant. Second count for 450*l.* due to the plaintiffs (trading as aforesaid) on an account stated.

Pleas — First, never indebted; second, (as to the sum of 200*l.*, parcel of the moneys in the first count mentioned, and the causes of action in respect thereof,) that, though true it is that the defendant was indebted to the plaintiffs, trading under the firm of G. Willis & Co., in the said sum of 200*l.*, for goods sold and delivered by the plaintiffs, so trading as aforesaid to the defendant at the time in the first count mentioned; yet that the goods to him by the plaintiffs, so trading as aforesaid, sold and delivered in respect of which he was so indebted, were certain goods of the plaintiffs, so trading as aforesaid, to wit, twenty coats, &c., theretofore, to wit, on the 1st of January, 1847, and on divers other days between, to wit, the 1st of January, 1847, and the 31st of December, 1848, by the plaintiffs, so trading as aforesaid, to the defendant sold and delivered. And that before any of the said times, to wit, on the 31st of December, 1846, the plaintiffs, so trading as aforesaid, requested, authorized, empowered and enabled one G. Willis to trade, &c., as a tailor, under the firm of G. Willis & Co.; that afterwards, to wit, on the 1st of January, 1847, and until the 20th of February, 1849, the said G. Willis, in pursuance of the said authority and request, did trade, &c., as a tailor under the firm of G. Willis & Co.; that afterwards, to wit, on the 1st of January, 1847, and on divers days between that day and the 31st of December, 1848, the plaintiffs, so trading as aforesaid, intrusted the said G. Willis so trading as aforesaid, with the said goods of the plaintiffs, so trading as aforesaid, and then, to wit, at the several times last aforesaid requested, authorized, empowered, and enabled the said G. Willis, so trading as aforesaid, to sell and deliver the same to such persons as he so trading should think fit, for and on his own account, so trading as aforesaid,

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and as and for his proper goods, so trading as aforesaid, and then requested, authorized, empowered, and enabled the said G. Willis so, &c., not to disclose to, and then requested the said G. Willis, so, &c., to conceal from such persons as he should sell and deliver the said goods to, that the said goods were the goods of, and were sold to such persons by the plaintiffs, so trading as aforesaid, and then requested, authorized, empowered, and enabled the said G. Willis so trading, to represent to such persons that the said goods were the goods of the said G. Willis, so trading, and that he had power to sell and deliver the same as and for the goods of the said G. Willis, so trading; that afterwards, to wit, on the 1st of January, 1847, and divers other days between that day and the 31st of December, 1848, the said G. Willis, so trading as aforesaid, sold and delivered the said goods to the defendant on account of, and as and for the goods of him the said G. Willis, so trading as aforesaid; that the said G. Willis, so trading as aforesaid, did not at any time disclose to the defendant that the goods were the goods of the plaintiffs, so trading as aforesaid, and represented at the several times, &c., that the said goods were his own proper goods, trading as aforesaid; that the defendant had not at any of the said times notice, or the means of knowing, that the said goods were the goods of the plaintiffs, so trading as aforesaid; that before he had any such notice or means of knowing, and before the commencement of the suit, to wit, on the 6th of March, 1850, the said G. Willis, so trading as aforesaid, was and still is indebted to the defendant in a large sum of money, to wit, a sum equal, &c., and against which sum so due and owing from the said G. Willis, so trading as aforesaid, to the defendant, the defendant is ready and willing, and hereby offers to set off, &c.

Replication to first plea, *similiter*; to the second plea, that the said G. Willis did not, so requested, authorized, empowered, or enabled by the plaintiffs as in that plea mentioned, sell and deliver the said goods to the defendant for or on account of the said G. Willis, as or for the proper goods of the said G. Willis, nor represent to the defendant that the said goods were the goods of the said G. Willis, or that the said G. Willis had the power to sell or deliver the same as or for the proper goods of the said G. Willis *modo et forma*. Issue thereon.

At the trial, before Cresswell, J., at the sittings in London, in Michaelmas term, 1850, it was proved that the plaintiffs were creditors of George Willis and L. Schmidt, who had traded under the firm of G. Willis & Co. That G. Willis and L. Schmidt had assigned their joint estate and effects to the plaintiffs; that the plaintiffs carried on the business for the benefit of, and as trustees for, the other creditors and themselves, and that G. Willis and L. Schmidt were employed by them as servants to carry on the business; that "G. Willis & Co." was over the door of the premises and on the invoices, and that G. Willis and L. Schmidt appeared to the world to be the owners of the business, the plaintiffs being never seen to take any part in it. Upon these facts, it was objected for the plaintiffs, that the plea was not proved. The counsel for the defendant

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then applied for leave to amend; but the learned judge, thinking the variance material, refused to allow an amendment. The defendant's counsel then applied to have the facts found specially under the 3 & 4 Will. 4, c. 42, s. 24. This was allowed; and the jury, under the direction of the learned judge, found a verdict for the plaintiffs on the second issue; and that "George Willis was not authorized to sell the goods as the goods of George Willis, but as the goods of George Willis & Co.; and that George Willis & Co. represented George Willis and L. Schmidt."

Byles, Serj., (November 22,) moved for a rule for a new trial on the ground of misdirection, or why judgment should not be given for the defendant according to the very right and justice of the case, according to sect. 24 of the 3 & 4 Will. 4, c. 42. First, the judge ought to have directed the verdict to be entered for the defendant. The jury have found an authority to George Willis to sell the goods as the goods of George Willis & Co., which is what the plea states.

[*Maule, J.* No; the plea alleges that he was authorized to sell them as his own; the evidence and the finding of the jury is, that he was authorized to sell them as the goods of George Willis & L. Schmidt. There may be no privity or mutuality between the defendant and the firm of Geo. Willis & Co., who are George Willis and L. Schmidt.]

Secondly, the plaintiffs are entitled to have judgment upon the finding of the jury, pursuant to sect. 24 of the 3 & 4 Will. 4, c. 42.

Rule refused on the first point.

The court having granted a rule *nisi* on the second point, —

Montagu Chambers and *W. J. Cooke*, January 21, showed cause; and

D. Keane supported the rule.

Per curiam. The court, in deciding upon this branch of the rule, which calls upon us to give judgment for the defendant according to the very right and justice of the case, cannot, I think, look at any thing except the pleadings and the finding of the jury; and even if we could look at the evidence, there is this difficulty for the defendant to meet, — that we have already decided, by refusing the rule upon the other point, — that, on the facts found by the jury, now indorsed upon the record, the learned judge did right in directing a verdict for the plaintiffs; in other words, that he rightly held the variance to be material to the merits of the case. This being our decision, the defendant cannot bring himself within the 24th section of the 3 & 4 Will. 4, c. 42, for one condition of the court, giving judgment as there provided, is, "that they shall think the variance immaterial to the merits of the case."

Rule discharged.

Ex parte O'Neill.

*Ex parte O'NEILL.*¹

November 23, 1850.

County Court — Warrant of Commitment under 9 & 10 Vict. c. 95, s. 105 — Time of issuing.

A warrant of commitment, under the 9 & 10 Vict. c. 95, s. 105, for non-appearance on a judgment summons, issued six months after the order of commitment, is regular, although by the rules of the county court a warrant is current but for two months.

A *habeas corpus* having been obtained to bring up the body of a prisoner, named J. O'Neill, in the custody of the governor of the Middlesex house of correction, the return stated the following facts:—

A warrant, dated the 9th of October, 1850, under the seal of the Shoreditch county court of Middlesex, recited that a judgment had been recovered against the prisoner in the county court for the payment of a sum of money by instalments; that the prisoner, having made default in payment, was summoned to appear on the 15th of April, 1850; that he did not appear, or allege any reason for not appearing, and that the judge on that day made an order ordering that he should be committed for fourteen days for not appearing. He was arrested on the warrant on the 14th of November, 1850.

Skinner now moved for the discharge of the prisoner. The warrant was not issued for six months after the adjudication, and therefore is inoperative. It is made under the 102d section of the 9 & 10 Vict. c. 95, which enacts, that when an order of commitment is made by the judge of a county court, the clerk shall make out a warrant. It surely is his duty to do so at once, and not allow any unreasonable period of time to elapse. The 105th section of the act confirms that view, since it gives the judge power to suspend an order on proof that the defendant is unable from sickness, or other good cause, to pay the debt, which would have been unnecessary if the issuing of the warrant might have been deferred under the 102d section. Besides, the 37th rule of the county courts makes such a warrant as this current for no more than two months.

Jervis, C. J. We desired to have a return in this case, because the point was one of a novel kind and affected the liberty of the subject. But, on looking at the warrant, we think that it was within the jurisdiction of the judge, and that the provisions of the act of Parliament have been complied with. There appears to have been a judgment recovered, a judgment summons, and an order of imprisonment for fourteen days for not appearing upon the summons. The fourteen days must be counted from the day of the arrest. There is no rule that the warrant must be issued within a certain time. There is, indeed, a rule that the warrant shall not be current for more than two months. But it does not appear in this case that there had not been

¹ 20 Law J. Rep. (N. S.) C. P. 69.

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another warrant, and numbers may have been issued on account of the prisoner keeping out of the way.

MAULE, J. The prisoner does not allege that he could have been taken earlier than he was taken. As there is no rule against it, I think the proceeding was regular.

WILLIAMS, J. I am of the same opinion. It may be that a rule of practice ought to be made with regard to the point raised in this case; but as there is no rule at present, I think the warrant was regular.

Prisoner remanded.

EAST ANGLIAN RAILWAYS COMPANY v. LYTTHGOE.¹

February 21, 1851.

County Court, Appeal from — Set-off — Claim for Quarter's Salary — Dismissal of Servant — What is Matter of Appeal.

The defendant was a clerk to the plaintiffs under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or on payment of three months' salary. The plaintiffs discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him, without notice or salary. They subsequently sued him in the county court to recover 30*l.* which he had received to their use. The defendant admitted the receipt of the 30*l.*, but relied as a defence, by way of a set-off, on a claim for 35*l.* for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—

Held, on a case stated, that although there were no sufficient grounds for depriving the defendant of his salary, yet as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became, on the dismissal, a debt to the defendant, and was a proper subject of set-off:—

Held, also, that the court above would not review the judgment of the county court judge on a question of fact; or, if the judgment given by him were right, consider whether the reasons he assigned for it were valid in law.

Quere, per Maule, J., whether any appeal will lie from the decision of a county court, except in cases in which a jury has been summoned to decide on the facts.

THE following case was stated for the opinion of the court of common pleas, from the county court of Lynn, in Norfolk:—

This was an action brought in the county court of Norfolk, held at Lynn, for 30*l.*, claimed by the plaintiffs to be due to them from the defendant, as money had and received to their use.

Upon the trial of the case, it was not denied that the money had been received by the defendant on account of the company, but the defence was a set-off for a larger amount, viz., 35*l.*, alleged by the defendant to be due to him from the company, for three months' salary, as their clerk; and the question between the parties was, whether the set-off could be supported.

¹ 20 Law J. Rep. (N. S.) C. P. 84. This case was heard before MAULE, WILLIAMS, and TALFOURD, JJ.

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The facts, as they appeared in evidence, are these: The defendant was the audit clerk to the plaintiffs, under an agreement for 140*l.* a year, determinable by three months' notice, or payment of three months' salary. The whole of the traffic accounts of the company's railways, and all other the books of account of the said plaintiffs, were under the defendant's charge, or accessible to his inspection. It was part of the defendant's duty to keep up, from week to week, the statistics of the said railways, with a view to their publication to the shareholders, at the end of each half year. It might be of importance to the interests of the shareholders that such information should not transpire except at the periodical meetings, so that no unfair advantage might be derived from priority of information. In the month of August, 1850, it was discovered that the defendant was carrying on a private correspondence with Mr. Eadson, the traffic manager on the East Lancashire Railway, as also with Mr. Murnane, a clerk on the Eastern Counties Railway, who transacted at Ely the business as well of the Eastern Counties Railway Company as of the East Anglian Railways Company; the latter company having an arrangement with the former for the use of the station and clerk, (Mr. Murnane not being the servant of the East Anglian Railways Company,) as assumed in the judgment, copied below.

Upon this discovery, the directors challenged the defendant with the fact, which he for some time strenuously denied, but ultimately he produced a manifold writer, in which there appeared, in his own handwriting, the three letters marked A, C, and E, hereunto annexed, which the defendant admitted to have written. The directors thereupon discharged the defendant from his said employment. On being informed that he was discharged, the defendant said, "Well, gentlemen, I shall not seek a reversal of your sentence, for I feel that I have deserved it all." The letters A and C were put in evidence by the defendant's attorney, and the letter E was put in evidence by the plaintiffs' attorney, but the defendant denied that he had posted letter A; though at the same time he admitted the facts above stated, with reference to the circumstances of his discharge, and also admitted that he had not on any previous occasion denied the posting of such letter. He admitted the posting of letters C and E. The plaintiffs objected to the admission of any evidence in support of the defendant's set-off, on the ground that the claim, if maintainable at all, was for damages, which could not be the subject of a set-off, no service having been performed during the three months, in respect of which the salary was claimed, and the period not having elapsed at the commencement of this action.

"Lynn, Norfolk, May 21, 1850.

"Dear Sir, — In the absence of the secretary, I opened your letter for payment of your expenses, 34*l.* 3*s.* The request and the amount appear 'nobby,' and I wish you may get it. Snell (the secretary's *factotum*) has written to Bruce for particulars, so that the bill may be laid before the board on Friday next. Mr. Clay and I are getting on famously together, but I regret to say our situations are not worth three months' purchase. There is still a good deal of angry feeling

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on the part of the bondholders, and I doubt not but the lines will be let to Baxendale, or some other great capitalist. Our traffic is miserable, and insufficient to pay 5*l.* per cent. to the creditors. Trusting you are well, I am, &c.,

J. LYTHGOE.

"Mr. Eadson."

"Lynn, Norfolk, May 25, 1850.

"Dear Sir, — I have just seen the letter which Bruce has requested to be written in answer to your solicitor. It appears that Bond, who is absent from Lynn, has got your bill somewhere in his possession, for it cannot be found. This is just the kind of excuse our people like to make, and you will have no hesitation in pronouncing it as humbug, practised by humbug Bruce. When the duplicate bill comes to him, you will have to wait until the next board day, fourteen days hence, before it can be paid, if paid then. I need hardly remark that our committee of creditors and directors consider it an extortionate amount. That they should have this idea pleases me right out, for I know they will complain at old Bruce until he becomes thoroughly wild. Wishing you may get the 34*l.* 3*s.* net cash, I remain yours, respectfully,

J. LYTHGOE.

"R. Eadson, Esq., Lancashire.

"August 5, 1850.

"Dear Sir, — Look well over the Hartlepool Coal Company's accounts, and see that they are all paid to you. I am in hopes that you will find something to your advantage in this matter. I have private reasons for drawing your attention to this, and shall require you to keep this communication to yourself. Yours truly,

"Mr. Murnane.

J. LYTHGOE."

Copy of his honor's judgment.

The question is, not whether the company were justified morally or even legally in dismissing the defendant, but, whether they were justified legally in dismissing him without notice or payment of three months' salary. It has been held in *Callo v. Bronveker*, 4 Car. & P. 518, that to justify such a dismissal there must be proved against him moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. Neither of the two latter is imputed to him. Has he been guilty of the former? I think he would have been guilty of "moral misconduct" if it had been proved against him that he made use of a knowledge acquired by virtue of his employment to the prejudice of his employers. Let us examine whether there is any proof of that, and let it be always remembered that it is the duty of any one making such a charge to support it by legal proof. A great writer has said, "Thoughts are no subjects." A man has a right to think what he pleases, and also to commit his thoughts to paper, provided he does not allow any one to see the paper. Therefore, as the first letter was never published, I am bound to dismiss it from my consideration, for the burden is upon the company to show that he not only contemplated committing, but did actually commit, such an offence as I have described. Let us now examine the second letter. That letter begins by giving information which the company had

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actually had written for the very purpose of giving such information. As the company could not be prejudiced by its earlier communication, there was nothing injurious to the company in making it. But it also charges the company with being addicted to shuffling conduct. This was a most improper communication to proceed from an *employé* of the company, and would morally abundantly justify the company in dismissing the defendant; but it will not legally justify them in dismissing him without notice or salary, because I think a proper test by which to try it is this, that in an action for the libel no damages would be recovered unless special damage was proved. The remainder of the letter seems to breathe of considerable personal hostility to Mr. Bruce, but it is not a matter affecting the company. If there had been any thing apocryphal in the third letter, it was the duty of the company to prove it. All that I can collect from it is an exhortation to Mr. Murnane, a servant of the company, to do his duty. His duty was to look well to the accounts, and it would be his interest to do his duty. Whether there had been any suspicion that he had been remiss, I know not; but an exhortation to a man to do his duty cannot be an offence, whoever may give it. For these reasons, I do not think that the company has made out a legal justification for dismissing without notice, and a set-off must be allowed.

The question for the opinion of the court was, whether the set-off was properly allowed.

Wheeler, for the appellants, the plaintiffs below. The decision of the court below was wrong; because, first, the company were entitled to dismiss the defendant without notice or salary; and, secondly, even if the dismissal without salary were not justifiable, the claim of the defendant was not a claim that could be made a matter of set-off. As to the first point, it is submitted that the judge's decision was wrong with respect to the company's right to dismiss the defendant.

[*Maule, J.* How can we enter into that question of fact?]

His judgment on the question cannot be supported.

[*Maule, J.* Can we enter into a consideration of the reasons he assigns in preparing his judgment?]

[*Talfourd, J.* This case is not in the nature of a special case or special verdict.]

The facts of the case show that the company were justified in dismissing the defendant; that he was guilty of moral misconduct. His publishing information which he acquired solely in his capacity as audit clerk, and which it was his duty to keep secret, was moral misconduct, justifying immediate dismissal, without notice or wages. It was not necessary for the company to be able to prove that they had actually sustained damage. *Amor v. Fearon*, 9 Ad. & E. 548; s. c. 8 Law J. Rep. (N. S.) Q. B. 95. *Filleul v. Armstrong*, 7 Ad. & E. 557; s. c. 7 Law J. Rep. (N. S.) Q. B. 7. There is another objection in law open on this part of the case. The judge improperly rejected evidence of the first letter. It was proved that it was written, though not that it was sent by the defendant. Writing such a paper, without sending it, is moral misconduct, tending to the prejudice of the company.

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[*Maule, J.* What piece of evidence did the judge reject? He admitted the letter.]

He, in fact, rejected the evidence of that letter by rejecting its effect. He did not allow it to have any weight with him. Had there been a jury, he would have withdrawn that letter from their consideration. That would have been a misdirection. His rejecting it from consideration was wrong.

[*Maule, J.* You say, in effect, that the judge misdirected himself.]

He should have found the defendant on these facts guilty of moral misconduct.

[*Maule, J.* Was not that a question of fact for a jury? There is no appeal open as to matters of fact.]

The county court judge, in his capacity of jury, had to decide the facts; but the legal inference from those facts was matter of law for his decision in his capacity of judge, and from his decision it is submitted the plaintiffs may appeal. *Smith v. Thompson*, 8 Com. B. Rep. 44; s. c. 18 Law J. Rep. (n. s.) C. P. 314. Secondly, assuming that the defendant was entitled to claim a quarter's salary, such a claim was not a subject of set-off. In the note to *Cutter v. Powell*, 2 Smith's L. C. 20, it is said, as the result of the authorities, "that a clerk, servant, or agent wrongfully dismissed has his election of three remedies, namely: first, he may bring a special action for his master's breach of contract in dismissing him, and this remedy he may pursue immediately; secondly, he may wait till the termination of the period for which he was hired, and he may then perhaps sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service; thirdly, he may treat the contract as rescinded, and immediately sue on a *quantum meruit* for the work he actually performed."

[*Maule, J.* The clerk here was not dismissed wrongfully or contrary to the contract.]

A set-off cannot be maintained unless for a claim for which *indebitatus assumpsit* will lie. *Howlett v. Strickland*, Cowp. 56, and *indebitatus assumpsit* will not lie for such a claim as this. Here, the set-off was pleaded before the time for service had expired. *Fewings v. Tisdal*, 1 Exch. Rep. 295; s. c. 17 Law J. Rep. (n. s.) Exch. 18.

[*Maule, J.* That case merely shows that *indebitatus assumpsit* for work and labor will not lie to recover a month's wages in respect of the month in which the servant has not worked or labored. But debt or *indebitatus assumpsit* of a special kind could have been maintained by the defendant to recover his quarter's salary. He might have averred that the company were indebted to him in a sum of 35*l.* in respect of so much money which the company had agreed to pay him in case they dismissed him without notice; that they had dismissed him without notice, and that therefore the company, being so liable, had promised to pay. That is the kind of count which the court in *Fewings v. Tisdal* mean when they say that a special count is necessary. *Indebitatus assumpsit* will not lie for a wrongful dismissal, but it will lie for a dismissal contemplated by the agreement.

Williams, J., referred to *Duckworth v. Alison*, 1 Mee. & W. 412; s. c. 5 Law J. Rep. (n. s.) Exch. 171.]

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The point as to the set-off was not discussed in that case.

MAULE, J. If there be any point of law that can be brought before us in this case, it is the one last argued by the learned counsel with respect to the set-off. It is very clear that where there is an agreement such as this, to pay a certain amount on a certain event, the amount becomes a debt as soon as the event happens, and is a proper subject of set-off. Supposing, then, that the question can be raised before us, I am of opinion that it has been properly decided in the county court.

As to the objection with respect to the evidence. It is plain that the judgment of the county court cannot be reviewed on a matter of fact, although it may be with respect to the rejection or admission of evidence. But there was no rejection of evidence here, — all was proved that could be. Then, it is said, that there has been a misdirection. The judge, in giving what is popularly called his judgment, has let fall some observations which may be open to criticism, as is often the case; but expressions used by a judge in giving his decision are not all binding as the reasons of the judgment. If the judgment can be sustained on any good reason, the party for whom it has been given is entitled to retain it. What the judge below has said by way of observation must, therefore, be entirely excluded from consideration, and that portion of the case which is termed "copy of his honor's judgment" may properly be struck out. I am, however, disposed to think that in a case like the present, where the law is given inextricably mixed with the fact, it was not intended by the legislature that there should be any appeal. Where the parties do not withdraw the question of fact from the judge of the county court, and he takes a case, even though we may be able with more or less difficulty to pick out from among the facts that he has decided a matter of law, I think it is much to be considered whether such a decision can be a ground of appeal. But if there be a jury to decide on the facts, every determination of the county court judge with respect to the admission or rejection of evidence between them, and every direction to them in point of law, is as open to review as the decisive direction of a judge of one of the superior courts. If this view be correct, there could be no appeal except when the matter was tried before a jury. And such, I think, would be a wise construction to put upon the statute, for when the sum demanded exceeds 5*l.*, either party may require that the case shall be decided by a jury. If they leave it to the judge to decide both the fact and law, they in some measure put him in the situation of an arbitrator; and it is found practically convenient that such a decision should not be open to review. It is true that when the amount claimed is under 5*l.*, neither party alone can require the attendance of a jury; but in legislation there must always be a balance of evils, and where small sums are in question, it is better that the mode of decision should be summary. Assuming that the appeal will lie, I am of opinion that the respondent is entitled to our judgment, and that the appeal must be dismissed, with costs.

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WILLIAMS, J. I am of the same opinion. It is contended that the judge of the county court was wrong in allowing this set-off; that this claim was not a subject of set-off; and that the defendant was not entitled to maintain the claim because the company were justified in dismissing him without notice or three months' wages. It seems to me that that question was a question of fact for the judge, and that whether he has decided it rightly or wrongly, his decision can form no ground of appeal. It is also said that the judge was wrong in rejecting the evidence of the first letter. But it does not appear that he rejected any evidence as to it, and the objection resolves itself into this, that he did not give proper weight to it.

TALFOURD, J. I am of the same opinion. The only question is, whether the quarter's salary was a proper matter of set-off. Whether the defendant was entitled to set off this claim or bring an action for it, is purely a matter of fact. The judge below, in deciding it, has acted rather as a jurymen than as a judge. Then, as to the letter, there can be no doubt that it was properly received in evidence, being in the handwriting of the defendant; whether proper weight was given to it, is a question of fact.

Appeal dismissed, with costs.

GRANT & others v. NORWAY & others.¹

January 27 and February 28, 1851.

Authority of Master of a Ship—Bill of Lading.

The master of a ship has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.

CASE. The declaration stated, that the defendants were possessed of a ship, called the "Belle," lying in the river Hooghley, in Bengal, bound for the port of London, for the carriage of goods and merchandise for freight to be paid to the defendants in that behalf; and that the defendants gave to certain persons, trading under the name of Messrs. Biale, Koch, & Co., a bill of lading, signed by the master of the said ship, acknowledging the receipt on board of such ship of twelve bales of silk, shipped by Messrs. Biale, Koch, & Co., to be delivered at the port of London to the order of the said shippers.

The declaration alleged that Biale, Koch, & Co. indorsed the bill of lading to, and pledged the same with, the plaintiffs as a security for 1684*l.* 9*s.* 7*d.*, the amount of an unpaid bill of exchange drawn by Biale, Koch, & Co., of which the plaintiffs were the indorsees and *bona fide* holders, and that the plaintiffs had been induced to become such indorsees solely by the deposit of the said bill of lading.

¹ 15 Jur. 296.

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The declaration afterwards averred, that the silk had not been shipped, and that the bill of lading was untrue, and that the plaintiffs had not been paid the money for securing the payment of which the bill of lading was pledged as aforesaid. The defendants pleaded, *inter alia*, fourthly, a traverse that the master of 'the ship was the servant or agent of the defendants in that behalf, *modo et forma*; fifthly, a traverse that the defendants enabled the persons in the declaration mentioned to pledge the bill of lading as a security for the payment of money, *modo et forma*; and sixthly, a traverse that the defendants did give and deliver to the said persons in the declaration mentioned the said bill of lading, *modo et forma*. Issues joined thereon.

At the trial, before Wilde, C. J., at the London sittings, after Trinity term, 1849, the jury, as to the above-mentioned issues, found a special verdict, which stated in effect, that, during the year 1846, the plaintiffs carried on business as merchants at Calcutta, and that during the month of April, 1846, the defendants were the owners of the above-mentioned ship called the "Belle," and that the said ship was then lying in the river Hooghley, at Calcutta, in pursuance of a charter party, and was then, in pursuance of such charter party, bound for the port of London, for the carriage of goods and merchandise to be shipped on board thereof, for freight to be paid to the defendants in that behalf, according to the said charter party; and that one Henry Tillman then had been and was appointed by the defendants, and was then, the master of the said ship; that on the 17th April, 1846, whilst the ship was lying in the Hooghley, the said Henry Tillman, being such master, and professing to act as such master, signed and delivered to the said Messrs. Biale, Koch, & Co., who were merchants carrying on business in Calcutta, a bill of lading, which was in the usual form, and was in the following terms:—

"Shipped, by the grace of God, in good order and well conditioned, by Messrs. Biale, Koch, & Co., in and upon the good ship, called the 'Belle,' whereof is master, for this present voyage, Tillman, and now riding at anchor in the river Hooghley, and bound for London, that is to say, twelve bales of silk, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of London, (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted,) unto order or to assigns, he or they paying freight for the said goods at 5*l.* sterling per ton of 20 cwt., with primage and average accustomed. In witness whereof, the said master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void; and so God send the good ship to her desired port in safety. Amen. Dated in Calcutta, April 17, 1846.

"H. TILLMAN, Commander.

(Indorsement) "Biale, Koch, & Co.

("Contents unknown.")

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It appeared from the special verdict, that, by the delivery of the said bill of lading, the said Messrs. Biale, Koch, & Co. were enabled to pledge and deposit the said bill of lading with other persons as a security for the payment of money; and that afterwards, on the 18th April, 1846, the plaintiffs purchased from the said Biale, Koch, & Co., who then indorsed and delivered to the plaintiffs, for full value, the bill of exchange in the pleadings mentioned, upon the terms that the payment of the amount of the said bill of exchange should be secured by the deposit and pledge of the said bill of lading; and that the said Biale, Koch, & Co. then indorsed the said bill of lading to, and pledged and deposited the same with, the plaintiffs as a security for the payment of the sum of 1684*l.* 9*s.* 7*d.*, being the amount of the said bill of exchange of which the plaintiffs, at the request of Biale, Koch, & Co., then became the indorsees and *bona fide* holders for value.

The jury, by the special verdict, found that the bill of lading, if true, and if the goods therein described to be shipped had been really shipped, would have been an available security to the plaintiffs of the value of 780*l.*; and that the goods would have been, according to the custom of merchants, deliverable to the plaintiffs, as such holders of the bill of lading; and that although afterwards, on the 20th April, 1846, the ship sailed and proceeded from the river Hooghley to London, she did not carry or deliver there the said supposed goods in the bill of lading mentioned, nor any part thereof; and that, in truth, the said goods never were, nor was any part thereof, shipped upon the said ship; and that the said bill of lading and the contents thereof were wholly untrue. It also appeared that the bill of exchange had been dishonored, and that the plaintiffs had never been paid the money for securing which the bill of lading had been pledged with them. There was set out in the special verdict a copy of the charter party which had been entered into between the defendants and Messrs. Biale, Koch, & Co., for the carriage of the goods to be shipped on board at Calcutta by the said Biale, Koch, & Co., and by the terms of which charter party it appeared that the master was to sign bills of lading, at any rate of freight required, without prejudice to such charter party. The case was now argued by

Crowder, Q. C., (Channell, Serj., and Bovill with him,) for the plaintiffs, who contended that the defendants were liable, as, being owners, they were responsible for the consequences of the act of the master in signing and issuing the bill of lading for goods which were not put on board the ship; that a master of a vessel is the general agent to conduct the business of the ship, and that, as such, he has authority to sign bills of lading; and that for what the master does in the course of such agency the owners of the vessel are liable. The following authorities were cited: Story on Principal and Agent, s. 116, 119, 127. *Howard v. Tucker*, 1 B. & Ad. 712. *Ewbank v. Nutting*, 7 C. B. 797. *Jenkins v. Osborne*, 7 Man. & G. 699. *Thompson v. Dominy*, 14 Law J. Rep. (N. S.) Exch. 320; 14 M. & W. 403. *Prescott v. Flinn*, 9 Bing. 19. *Alexander v. Mackenzie*, 13 Jur. 346; 6 C. B. 766. *Llewellyn v. Winckworth*, 14 Law J. Rep.

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(N. S.) Exch. 329; 13 M. & W. 598. *Pickering v. Busk*, 15 East, 38. *Trueman v. Loder*, 9 Law J. Rep. (N. S.) Exch. 165; 11 Ad. & El. 589.

Butt, Q. C., (*Cleasby* with him,) for the defendants, contended that the defendants, as owners of the ship, were not liable to the plaintiffs for the consequences of the act of the master in issuing a bill of lading for goods which were not received on board the vessel; that it is no part of the duty of a master, nor of the authority with which he is clothed, to sign bills of lading, by way of receipt, for goods which are not in fact on board, but, on the contrary, such acts were directly opposed to the nature and object of his employment; and that neither the declaration nor the facts stated in the verdict imputed any fraud or negligence on the part of the defendants. The following authorities were cited: *Berkley v. Watling*, 7 Ad. & El. 29. *Cornfoot v. Fowke*, 9 Law J. Rep. (N. S.) Exch. 297; 6 M. & W. 358. *Lickbarrow v. Mason*, 2 T. R. 75; and Story on Principal and Agent, s. 318, 456.

Cur. adv. vult.

February 28, 1851. JERVIS, C. J., now delivered the following judgment. This case was argued before my brothers Cresswell, Williams, and myself: it arises on a special verdict, and presents a question of considerable importance, both to those who take bills of lading on the faith of their representing property which passes by the transfer of them, and to the ship owner, who is attempted to be bound by all bills of lading that a captain may think proper to sign. The point presented by the several pleas is substantially one and the same, namely, whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and management of the vessel, but it is subject to several well-known limitations. He may make contracts for the hire of the ship for carrying, or he may vary that which the owner has made; he may take up moneys in foreign ports, and, under certain circumstances, at home, for necessary disbursements for repair, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may contend that it is. He may make contracts to carry goods on freight, but cannot bind the owner to carry freight free. So, with regard to goods put on board, he may sign the bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage shows that the master has a general authority; and if a more limited authority is given, the party not informed of it is not affected by such limitation. The master is a general agent to perform all things relating to the usual employment of his ship; and his authority, as such agent, to perform all such things as are necessary in the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him. This general

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proposition is laid down by Mr. Smith in his *Mercantile Law*, p. 559. Is it, then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? All parties concerned have a right to assume that the agent has authority to do all that is necessary; but the very nature of the bill of lading shows that it ought not to be signed till the goods are on board, for it begins by describing them as "shipped." Indeed, it was not contended that such a general authority was usual. In *Lickbarrow v. Mason*, 2 T. R. 77, Buller, J., says, "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore it would be a fraud in the captain to sign such a bill of lading if he had not received goods on board, and the consignee would be entitled to his action against the captain for the fraud." It is not contended, in this case, that the captain had any real authority to sign the bill of lading unless the goods had been shipped; nor can we discover any ground on which a party, taking a bill of lading by indorsement, could be justified in assuming he had authority to sign such bill, whether the goods were put on board or not. If, then, from usage and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case must be considered as if the party taking the bill of lading had notice of the express limitation of authority, and in that case undoubtedly he could not claim to bind the owner by the bill of lading signed, when the goods therein mentioned were not on board. It resembles the case of goods or moneys taken up by the master on the pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or indorsed by procuration, when no such agency existed. *Alexander v. Mackenzie*, 13 Jur. 346; 6 C. B. 767, shows that the words "by procuration" would give notice to all parties that the agent is acting with a special and limited authority; and, therefore, the party taking such a bill has to establish by evidence the authority. It is not enough, for that purpose, to show that other bills, similarly accepted and indorsed, have been paid, although such evidence, if the acceptance was general by the agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people, that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and the party taking the bill of lading, either originally or by indorsement of the goods, which have never been put on board, is bound to show some particular authority to the master to sign the bill in that form. There is very little to be found in the books on this subject; it was discussed in the case of *Berkley v. Walling*, 7 Ad. & El. 29; but that case was decided on another point, although Littledale, J., said, in his opinion the bill of lading was not conclusive, under similar circumstances, on the ship owner. For these reasons, we are of opinion that the issue should be entered for the defendants, and that the defendants are entitled to the judgment of the court.

Judgment for the defendants

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER.

FROM AND AFTER MICH. TERM, 14 VICT., A. D. 1850.

TURNER v. CAMERON'S COALBROOK STEAM COAL, AND SWANSEA
AND LOUGHOR RAILWAY COMPANY.¹

December 16, 1850.

*Use and Occupation, Evidence of — Mortgagee out of Possession —
Use and Occupation — Waiver of Trespass.*

C. having mortgaged a piece of land to the plaintiff, the defendants, a railway company, afterwards occupied it by laying their rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. The judge directed the jury that the plaintiff was in a condition to waive the trespass, in respect of the occupation of the land by the railway company, and to bring an action for use and occupation:—

Held, first, that there was evidence for the jury of the defendants' having held the land on the terms of paying for it. *Secondly*, that the plaintiff being a mortgagee out of possession, and not having entered upon the land previously to the trespass, nor having a judgment by default, or a verdict, in ejectment, in his favor, was not entitled to maintain an action of trespass against the defendants.

Quære. Supposing the plaintiff to have been in possession of the land, and the defendants to have trespassed thereon and occupied it to his exclusion for some time, whether he would be entitled to recover for use and occupation on the principle that he might waive the trespass and recover in *assumpsit*.

DEBT for use and occupation of a field called "The Mill Field," and other land.

Plea — Never indebted.

At the trial, before Williams, J., at the Glamorganshire spring assizes, 1850, the following facts were proved: In 1840 Col. Cameron, being the owner of a field called the "Mill Field," and of the other land in question, mortgaged them to the plaintiff, after which Cameron's

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Coalbrook, &c., Company was established, and in 1845 occupied the last-mentioned land by laying their rails upon it. The defendants, on being subsequently called upon for compensation in respect thereof, negotiated with the plaintiff (who had never been in possession) for compensation for the whole of the land. In October, 1848, the plaintiff served the defendants with notice of the mortgage, and then brought the present action.

The learned judge directed the jury that the plaintiff was in a condition to, and might by law, waive the trespass in respect of the occupation of the land by the railway company, and bring an action for use and occupation. The jury having found a verdict for the plaintiff in respect of the Mill Field and the other land in question, the learned judge, entertaining some doubts whether there was sufficient evidence to entitle the plaintiff to succeed as to the Mill Field, or at least as to the other land, gave the defendants leave to move to enter a nonsuit, or to reduce the verdict by the amount of the rent of the other land.

Benson having obtained a rule *nisi* to reduce the verdict, —

Davison and *Grove* showed cause, December 4. The direction of the learned judge was correct. The plaintiff was entitled to maintain ejectment against the defendants in respect of the other land, and therefore could turn the action for mesne profits into an action for use and occupation. *Standen v. Christmas*, 10 Q. B. Rep. 135; s. c. 16 Law J. Rep. (n. s.) Q. B. 265, is in point. From the time that the plaintiff was entitled to eject the tenant, he was entitled to bring an action for use and occupation. The mortgagor may be treated by the mortgagee as a trespasser. The defendants, having occupied the land to which the plaintiff had a good title, are bound to pay rent to him. The following cases were cited and referred to: *Lumley v. Hodgson*, 16 East, 99. *Birch v. Wright*, 1 Term Rep. 378. *Burrows v. Gradin*, 1 Dowl. & L. P. C. 213; s. c. 12 Law J. Rep. (n. s.) Q. B. 333. *Waddilove v. Barnett*, 2 Bing. N. C. 538; s. c. 5 Law J. Rep. (n. s.) C. P. 145. *Johnson v. Jones*, 9 Ad. & E. 809; s. c. 8 Law J. Rep. (n. s.) Q. B. 124. *Hull v. Vaughan*, 6 Price, 157. *Gibson v. Kirk*, 1 Q. B. Rep. 858; s. c. 10 Law J. Rep. (n. s.) Q. B. 297. *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307; s. c. 9 Law J. Rep. (n. s.) Q. B. 57. *Howard v. Shaw*, 8 Mee. & W. 118; s. c. 10 Law J. Rep. (n. s.) Exch. 334. *Kirtland v. Pounsett*, 2 Taunt. 145. *Partington v. Woodcock*, 6 Ad. & E. 690; s. c. 4 Law J. Rep. (n. s.) K. B. 239. *Pope v. Biggs*, 9 B. & C. 245; s. c. 7 Law J. Rep. K. B. 246. *Foster v. Stewart*, 3 M. & S. 191. *The Mayor, &c., of Newport v. Saunders*, 3 B. & Ad. 411; s. c. 1 Law J. Rep. (n. s.) K. B. 230.

Benson, in support of the rule. The learned judge was wrong in directing the jury that the plaintiff might waive the trespass and bring an action for use and occupation. In the present case, there is no privity between the plaintiff and the defendants. In *Hull v. Vaughan*, the declaration was for use and occupation at the request of the defendant by permission and sufferance of the plaintiff. *Howard v.*

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Shaw and Waddilove v. Barnett are distinguishable. It is now held that the mortgagor is not the agent of the mortgagee, as was formerly considered to be the law in *Pope v. Biggs*, and other cases. He cited *Evans v. Elliott*, 9 Ad. & E. 342; s. c. 8 Law J. Rep. (N. S.) Q. B. 51; and *Brown v. Storey*, 1 Man. & G. 117; s. c. 9 Law J. Rep. (N. S.) C. P. 225.

Cur. adv. vult.

The judgment of the court¹ was now given by

PARKE, B. After stating the facts as above set forth, his lordship proceeded: After the mortgage to the plaintiff, the Cameron's Company was established, and by some agreement or understanding with him, or in what other way does not appear by the evidence, the Coal Company occupied the land by laying their rails upon it, and it appears that afterwards, when they were called on for compensation, there was a negotiation between the plaintiff and the defendants for the payment of the compensation for the whole. That is evidence to go to the jury, that the defendants had held the land upon the terms that they were to pay for it; but it was no more than evidence to go to the jury, and if my brother Williams had left that question to the jury, there would have been no ground to disturb the verdict, for there certainly was evidence to go to the jury. But it appears on the confession of the learned counsel on both sides, that in leaving the case to the jury my brother Williams told them that the plaintiff was in a condition to, and might by law, waive the action of trespass which he was entitled to bring for the occupation of the land by the railway, and bring an action for use and occupation instead. That I think, upon the cases, may be considered as a doubtful question. Supposing the plaintiff to be simply in the situation of a person in possession, and the defendants to have trespassed on the land, and occupied that land to his exclusion for some time, whether that would have been a ground to recover for use and occupation, on the principle that the plaintiff might waive the trespass and recover in *assumpsit*, is a matter which may be treated as somewhat doubtful. But in this case we are all clearly of opinion that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of possession; he never had entered upon the property at the time of the trespass committed, never was seized, never was in actual possession, and he could not have maintained an action of trespass simply in the character of mortgagee. He could only have maintained one in case he had brought an ejectment, and laid the demise at an antecedent period, and the defendants had either suffered judgment by default as tenants in possession, or there had been a verdict on the trial; and then the defendants would have been in the condition of admitting the lease and consequent entry to make the lease; and therefore the plaintiff would have been in possession by the fiction in ejectment from the time of the day in the demise. But here no ejectment has been brought, and consequently the plaintiff never was in

¹ PARKE, ALDERSON, PLATT, and MARTIN, BB.

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such a situation to maintain an action of trespass at all. We therefore think my brother Williams was wrong in telling the jury that the plaintiff might waive the trespass, and recover in use and occupation. The result is, that there will be a new trial, unless the plaintiff consents to this rule being made absolute, in which case he will be entitled to recover for the use and occupation of the Mill Field, but not for the remainder.

Rule absolute accordingly.

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November 4, 1850.

Devise — Leaseholds passing under a general Devise — Effect of 1 Vict. c. 26, s. 24 and 26.

A testator, by will, made in 1815, devised "all the rest, residue and remainder of his personal estate, goods and chattels whatsoever and wheresoever," subject to the payment of debts and legacies, to his brother M. J. D. to and for his own use and benefit, and appointed him sole executor. He further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, &c., at or near W., in the county of D., and B., in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein, to R. E. D. Shafto." M. J. D. pre-deceased the testator, who, in 1841, duly made a codicil appointing another executor and ratifying and confirming his will, and died in 1844. At the time of his making the will and at his death, the testator was possessed both of freeholds and leasehold estates in the county of D.:—

Held, that, as under 1 Vict. c. 26, s. 24, the will must be deemed to have been made in 1844, this was a general devise of the testator's lands within 1 Vict. c. 26, s. 26, and that the leaseholds passed by it to R. E. D. Shafto, and that the prior devise of all the personal estate did not show a contrary intention so as to prevent the operation of the enacting part of the 26th section.

By order of the master of the rolls, the following case was stated for the opinion of this court:—

Sir Robert Johnson Eden, late of Windlestone, in the county of Durham, bart., duly made and published his will, dated the 14th of April, A. D. 1815, and after directing payment of all his debts, funeral and testamentary expenses, and giving certain annuities, with the payment of which he charged his real estates, in exoneration of his personal estate and certain legacies, he bequeathed as follows: "I give and bequeath all the rest, residue, and remainder of my personal estate, goods, and chattels, whatsoever and wheresoever, after and subject to the paying of my just debts, funeral and testamentary expenses, and the said legacies and bequests, except the said annuities, and all my estate and interest therein, to my brother, Morton John Davison, late Morton John Eden, absolutely, to and for his own use and benefit."

The testator further gave and devised as follows: "I give and devise all and singular my manors, or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying,

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arising and being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham, and Brignall, in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton, at Romanby, near Northallerton, in the North Riding of the county of York, and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto, of Whitworth, in the county of Durham, Esq., William Nesfield, of Brancepeth, in the county of Durham, clerk, and Thomas Hopper, of the city of Durham, Esq., and their heirs, subject to the said annuities so given and devised as aforesaid, to hold the same to and for the several uses and upon the trusts, and subject to the powers and provisoes hereinafter declared, that is to say, to the use of my said brother, the said Morton John Davison, and his assigns, for and during the term of his natural life, without impeachment of, or for any manner of waste; and from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said Robert Eden Duncombe Shafto, William Nesfield, and Thomas Hopper, and their heirs, during the life of the said Morton John Davison, upon trust, to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require, but, nevertheless, to permit and suffer the said Morton John Davison and his assigns, during his life, to receive and take the rents, issues, and profits of the said hereditaments and premises, to and for his and their own use and benefit; and from and immediately after his decease, to the use of the first son of the said Morton John Davison, lawfully begotten, and of the heirs male of the body of such first son lawfully issuing, and for default of such issue, to the use of the second, third, fourth, and all and every other the son and sons of the said Morton John Davison, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, lawfully issuing, the elder of such sons and the heirs male of his body being always to be preferred, and take before the younger of such sons and the heirs male of his and their body and bodies, and in default of such issue, to the use of Sir William Eden, baronet, his heirs and assigns, forever." And the said testator thereby constituted and appointed the said Morton John Davison executor of his said will.

The testator re-executed a codicil in 1835, making certain alterations of and additions to the annuities, but not otherwise affecting the will.

The said Morton John Davison died on the 28th of June, 1841, in the lifetime of the testator, and without ever having had any issue; and after his death, the testator made a codicil, duly executed and attested, in the following terms: "This is a codicil to the last will, and testament of me, Sir Robert Johnson Eden, of Windlestone, in the county of Durham, bart., which will is dated the 14th day of

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April, 1815. Whereas, by my said will I appointed, as the executor thereof, my late only brother, Morton John Davison, Esq., who died on the 28th day of June last; now I do, by this codicil, appoint my nephew, John Methold, Esq., the sole executor of my said will; and I hereby ratify and confirm and republish my said will, as witness my hand this 10th day of July, A. D. 1841." The said John Methold afterwards took the name of Eden, instead of John Methold.

The testator died on the 3d of September, 1844, without having revoked or altered his said will and codicils except as before mentioned. The testator was, at the time of his death, possessed of several leasehold estates in the townships of Merrington and Middlestone, both now in the parish of Merrington, in the county of Durham, held under various leases from the dean and chapter of Durham, for terms of twenty-one years respectively, a part of which leasehold estates was acquired by the testator's father in 1772, and the remaining portion thereof had been acquired by his father or himself at various times since. (The times were set out in the case, but it is not necessary to enumerate the particulars.) The dean and chapter of Durham have hitherto renewed the leases under which the said estates were held at the end of every seven years, according to their usual custom with respect to property held under leases from them; but the leases contain no covenant on their part to do so.

In the year 1833, the dean and chapter of Durham demised the coal mines under the leasehold estate and other adjoining lands, with power to erect cottages and make a railway, and several cottages have accordingly been erected, and a railway made through part of the said leasehold estates. The testator was not at the time of his death possessed of or entitled to any leasehold estates for years, except in the townships of Merrington and Middlestone.

The township of Middlestone was heretofore in the parish of St. Andrew Auckland, but was, on the 26th of April, 1845, annexed to the said parish of Merrington.

The parish of Merrington is intersected by a high ridge of hills ranging east and west, upon the summit of which the church and village of Merrington are situated; and the greater portion of the said leasehold estates, to the extent of five hundred and thirty-nine acres, thirty-eight poles, or thereabouts, lie to the south of the said ridge, and extend to, and for about two thousand and fifty yards abut on, the northern boundary of the freehold manor and estate of the said testator in the township of Windlestone, heretofore in the parish of St. Andrew Auckland, but now forming part of the new parish of Counden, which was made a parish in the year 1842, and adjoin the said freehold estate of Windlestone, but are in part separated therefrom by a turnpike road, and in part by the ordinary hedges of the country, through which are necessary communications for those tenants who hold both freehold and leasehold in the same farm; and in some instances the leaseholds were let, and occupied with the said freeholds, at undivided yearly rents. The said freehold estates are not intermixed with or surrounded by the freehold lands of the said testator, at Windlestone, but, with the exception of one plot

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containing about eighteen acres, they lie together, and a part of them are about a quarter of a mile from the mansion of Windlestone, but the turnpike road between Bishop's Auckland and Rushyford lies between them and the said mansion. The remainder of the said leasehold estates, containing about seventy-two acres, one rood, twelve poles, lie on the northern side of the aforesaid ridge, and about two miles from the said testator's freehold mansion and estate at Windlestone.

The said testator was, at the respective dates of making his will and of his death, seized of or entitled to, not only the said freehold manor and estate of Windlestone (which comprises the whole township of Windlestone, and contains eleven hundred and eighty-two acres, two roods, twenty-nine poles,) but also two freehold closes of land immediately adjoining the said Windlestone estate, and situate in the township of Counden, and containing together about sixteen acres, and the freehold tithes thereof, and also some detached portions of freehold lands in the said township of Merrington, and containing together about sixteen acres, and the freehold tithes thereof, and also some detached portions of freehold land in the said township of Merrington, and containing together about one hundred and six acres, and the freehold tithes of parts of the said leasehold estate in Merrington and of Middlestone; of an estate in the township of West Auckland, chiefly freehold and copyhold, with the freehold tithes thereof, and two leases for lives, containing together eleven hundred and sixty-two acres or thereabouts, and freehold lands in the township of Saint Helen's Auckland, containing three hundred and eighty one acres or thereabouts; of two freehold fields, containing together about nineteen acres, in the township of Bondgate, in Auckland; and of a freehold messuage in the city of Durham, but which said freehold fields and messuage were afterwards sold by the testator in his lifetime.

The said freehold mansion and estate of Windlestone has been in the possession and the residence of the family of the said testator for upwards of one hundred years; and there are several cottages (some of which are ornamental) and other buildings standing upon that part of the said leasehold estates which is nearest to the said mansion, and which buildings, consisting of three cottages called Well Houses, were, in the lifetime of the said testator, occupied by persons employed about the said mansion and estate at Windlestone; and the said testator during his life expended upwards of 40,000*l.* in rebuilding or restoring the said mansion and premises.

A bill having been filed by Eleanor Wilson, one of the sisters and next of kin of the testator, against John Eden, on the ground that the testator died intestate as to the leasehold estate, the above case was stated for the opinion of the court; the question being, whether the leasehold estates, of which the testator Sir Robert Johnson Eden died possessed, passed under the devise in his will of all and singular the manors, or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising and being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham, or in the city of Durham

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and Brignall, in the county of York, and all other his real estates in the said counties of York and Durham, and elsewhere in Great Britain, and all his estate and interest therein.

It was argued upon two occasions.¹ The full statement of the arguments in the judgment renders a detailed report unnecessary.

Humphrey, for the plaintiff, contended that the leaseholds did not pass, and that 1 Vict. c. 26, s. 26,² did not apply, citing *Rose v. Bartlett*, Cro. Car. 292. *Thompson v. Lawley*, 2 Bos. & P. 303. *Watkins v. Lea*, 6 Ves. 633. Jarman on Wills, 616, *et seq.* *Hobson v. Blackburn*, 1 Myl. & K. 571; s. c. 2 Law J. Rep. (N. S.) Chanc. 168. *Lane v. Stanhope*, 6 Term Rep. 345. *Goodman v. Edwards*, 2 Myl. & K. 759. *Cole v. Scott*, 1 Mac. & Gor. 518; s. c. 19 Law J. Rep. (N. S.) Chanc. 63. *Hull v. Fisher*, 1 Coll. C. C. 47.

Malins, for the defendant, contended that as the republication of the will after the passing of the 1 Vict. c. 26, made it a new will, it was within sects. 24³ and 26, and that even if not, the circumstances of the case excluded it from the rule laid down in *Rose v. Bartlett*. He commented on the cases cited for the plaintiff, and further cited *Addis v. Clement*, 2 P. Wms. 456. *Stone v. Greening*, 13 Sim. 390. *Doe d. York v. Walker*, 12 Mee. & W. 591; s. c. 13 Law J. Rep. (N. S.) Exch. 153. *Winter v. Winter*, 5 Hare, 306; s. c. 16 Law J. Rep. (N. S.) Chanc. 111. *Weigall v. Brome*, 6 Sim. 99. *Fitzroy v. Howard*, 3 Russ. 225.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. This case, which was sent for our opinion by the master of the rolls, arises out of the will of Sir Robert Johnson Eden, who died on the 3d of September, 1844; and the question is, whether certain leasehold estates of which he was possessed at his decease passed under the general devise of his real estates. The will was made in 1815, and the material parts are—he gave and bequeathed “all the rest, residue and remainder of his personal estate, goods, and chattels whatsoever and wheresoever, after and subject to the payment of his debts, funeral expenses, and so on, and all the estate and interest therein, to his brother Morton John Davison, late Morton

¹ June 6, 1849, and June 7, 1850, before POLLOCK, C. B., ALDERSON and ROLFE, BB.

² That section enacts, “That a devise of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which should describe a customary copyhold or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary copyhold and leasehold estates of the testator, or his customary copyhold or leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.”

³ That section enacts, “That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.”

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John Eden, absolutely, to and for his own use and benefit." The testator further gave and devised as follows: "I give and devise all and singular my manors, or lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments situate, lying, arising and being at or near Windlestone, West Auckland, St. Helen's Auckland and Bishop's Auckland, in the county of Durham, and Brignall, in the county of York, and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto of Whitworth, in the county of Durham, and others, upon certain trusts." Morton John Davison died in July, 1841, and thereupon the testator made a codicil, duly executed and attested, in the following terms: "This is a codicil to the last will and testament of me, Sir Robert Johnson Eden, of Windlestone, in the county of Durham, baronet, which will is dated the 14th day of April, 1815. Whereas by my said will I appointed as the executor thereof my late only brother, Morton John Davison, Esq., who died on the 28th day of June last; now I do, by this codicil, appoint my nephew, John Methold, Esq., the sole executor of my said will, and I hereby ratify and confirm and republish my said will, as witness my hand this 10th day of July, 1841."

The facts as to the leaseholds in question were these: the testator was at the time of his death possessed of several leasehold estates in the townships of Merrington and Middlestone, both now in the parish of Merrington, in the county of Durham, held under various leases from the dean and chapter of Durham for terms of twenty-one years respectively, a part of which leasehold estates was acquired by the testator's father in 1772, and the remaining portion thereof had been acquired by his father or himself at various times since. The times are set out in the case; but on this occasion it is not necessary to enumerate all the particulars and the various dates, under which somewhere about eight or ten different parcels were acquired. The dean and chapter of Durham have hitherto renewed the leases under which the said estates were held at the end of every seven years, according to their usual custom with respect to property held under leases from them; but the leases contain no covenant on their part to do so. The case states also as a fact, that the testator at the date of his will and at his death was seized of other real estate in the county of Durham besides his mansion in Merrington.

In this state of things, it was contended before us, on behalf of the plaintiff, that the leaseholds did not pass under the general devise of the real estates as land, &c., and in support of this view of the case *Rose v. Bartlett* was relied on, in which the general principle was laid down, which has been recognized and followed by very many authorities; and in *Thompson v. Lawley*, Lord Eldon went through the whole of the cases, and fully recognized the general doctrine. On the other hand, it was contended for the defendant, that there are in this case circumstances which distinguish it from *Rose v. Bartlett* and other cases in which leaseholds have been held not to pass. In the first place, here the leaseholds by usage, although not by express contract, have always

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been renewed from time to time so as to give them partial permanency as estates held in fee simple. Secondly, some of the leaseholds have been let and occupied with some of the freeholds at undivided yearly rents, and not distinguishing what were the rents of freeholds and what the rents of the leaseholds; and, thirdly, the leaseholds almost entirely bordered on the family mansion and grounds, and some part of them extended up to even a quarter of a mile from the mansion itself, and some cottages were erected thereon by the testator for the use of persons employed about the mansion. These and similar circumstances are pointed out by Lord Eldon in the case we have referred to as circumstances which might prevent the operation of the general rule; but even if they would not do so in the present instance, still it was contended that here the late stat. 1 Vict. c. 26, s. 26, is decisive, and puts an end to all questions on the subject. Now, we are of opinion that this section clearly governs the present case, so that it is unnecessary for us to speculate as to what our decision would have been if we had been called on to make it in the year 1837, and not in the present year. In the first place the will, having been republished by the codicil in 1841, must, according to the express provisions of the 24th section of the statute, be deemed to have been made at that date, and is therefore to be treated as a will made after the 31st of December, 1837. That being so, let us consider how the case would have stood prior to the act if the testator had had no lands whatever, except these leaseholds. It is clear, in such a case, the leaseholds would have passed in order that some effect might have been given to the will. This, indeed, is a branch of the general rule enunciated in *Rose v. Bartlett*, and cannot be disputed. This being so, the 26th section of the statute states positively that the general devise shall be construed to include the leaseholds, unless a contrary intention appears by the will. It was alleged that such contrary intention does appear here, because there is an express gift of all the residue of the personal estate to the testator's brother, which he contended was inconsistent with the gift of the leaseholds, which are part of the personal estate, to the trusts for the purpose of the settlement; but this is a fallacy. If before the statute a testator having leaseholds, but no freeholds, in Durham, had given all his land in Durham to A. B., and all his personal estate to C. D., there can be no doubt that A. B. would have taken the leaseholds: the circumstances in such a case show that under the words "personal estate" the testator did not mean to include the leaseholds; and if such would have been the construction before the statute in a case where the testator had only leaseholds, so now the same construction is by the express words of the statute to prevail, even although the testator had freehold as well as leasehold.

The gift of "of all my personal estate" clearly means only "all my personal estate not otherwise disposed of." And when the statute has made the general devise a valid disposition of the leaseholds along with the freeholds, it follows that they are not included in the general description of "all my personal estate," or "all the residue of my personal estate." The only other circumstances relied on as showing an

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intention to exclude the leaseholds, were the powers of jointturing and leasing. We attribute no weight to this part of the argument. The power would be available in equity, and is to affect the renewed leases from time to time, and the case finds as a fact that such renewals were always regularly made.

It remains only to notice the argument of the counsel for the plaintiff, namely, that he had no necessity to resort to the words at the end of the 26th section, "unless a contrary intention appears on the face of the will," for that here the case was not brought within the enacting part of the section. He contended that there is not here a devise of the land of the testator in any place so as to come within the language of the statute, but in this he was clearly wrong. The words of the will are, "I give and devise *inter alia* all my lands near Windlestone, and all other my real estates in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto." Surely a devise of "my land near Windlestone" is a devise of the testator's lands in some place; and certainly the words amount to a general devise, which, before the statute, would have included leaseholds, if there had been no freeholds to which the description would apply.

We think it clear, therefore, first, that the enacting words of the 26th section apply to this case; and, secondly, no contrary intention appears on the face of the will, so as to prevent the operation of the enactment. This being our view of the effect of the statute, it is unnecessary to consider how the case would have stood independently of the statute. We must say, there are very strong grounds for contending that the facts of this case would have led to the same result as that which we have arrived at, even if the statute had never been passed. We shall certify our opinion to the master of the rolls, in conformity to the opinion which we have now expressed.

Certificate accordingly.

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November 16, 1850.

Covenant — Assignment of Patent — "Or" not construed "and."

In a deed by which A assigned to B for a term of years an exclusive license to use a certain patent, after covenants for payment of certain sums in the nature of royalties, there was the following clause: "That if it shall happen in any year during the continuance of the term that the royalties or sums of money hereinbefore covenanted to be paid shall not amount to the sum of 2000*l.* sterling, then B shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A such a sum of money as with the said royalties will amount to 2000*l.* for that year, or if B shall at any time make default in payment of such sum of money aforesaid within the time appointed for payment, then it shall be lawful to and for A, by writing, signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the license and power thereby granted shall cease and determine: —

¹ 20 Law J. Rep. (N. S.) Exch. 78.

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Held, that this was not an absolute covenant by B to pay 2000*l.* a year during the term, but only empowered A to put an end to the grant upon non-payment of that sum.

COVENANT. The declaration, after setting out certain recitals in a deed of indenture between the plaintiff and defendant, and stating the assignment of the plaintiff to the defendant by the said deed of an exclusive license to use a certain patent upon payment of certain sums by way of royalties to the plaintiff, during the term therein stated, averred that the defendant covenanted "that if it should happen in any year during the continuance of the term that the royalty or royalties, or sum or sums of money covenanted to be paid as aforesaid, should not amount to the sum of 2000*l.* sterling, then and in every such case, and as often as the same should so happen, the defendant would, within fourteen days after the expiration of any year in which it should so happen, pay to the plaintiff such a sum of money as, with the royalty or royalties reserved and covenanted and agreed to be paid as aforesaid, would amount to and make up the whole and clear sum of 2000*l.* for that year; or if the defendant at any time should make default in payment of such sum of money as aforesaid, within the time appointed for payment, then it should be lawful to and for the plaintiff, by any writing signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the license and power thereby granted should cease and determine." Breach, that although the sums by way of royalty amounted to less than 2000*l.* a year, the defendant had not made up the sum of 2000*l.* a year.

General demurrer and joinder.

Hugh Hill, in support of the demurrer.¹ The covenant is here in the alternative, and not an absolute covenant to pay 2000*l.* a year during the continuance of the term. The intention of the parties is, that should the royalties not amount to 2000*l.*, then the defendant has the power of retaining the license by making up that sum; but if he does not, the plaintiff may, if he pleases, put an end to the license. The grammatical sense need not be departed from, as nothing in the context requires that "or" should be read "and."

M. Smith, *contra*. The plaintiff parted with the patent for the whole of the term, and it is reasonable to construe the deed so as to entitle him to a minimum rent. No particular form of words is necessary to constitute a covenant, and this is a condition in favor of the plaintiff as well as a covenant by the defendant. The words "if he make default" imply that there was an absolute payment imposed by the previous words, and "or" may well be read "and." He cited *Shep. Touch.* 162.

Hugh Hill, in reply, cited *Co. Litt.* 303, b; *Hays v. Bickerstaffe*, 2 Mod. 35; *Warren v. Asters*, T. Jones, 205; and stated that in the

¹ November 15, before POLLOCK, C. B., PARKE, ALDERSON, and PLATT, BB.

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agreement which formed the basis of the deed, it was stated that a provision should be inserted in the deed, that either the sum of 2000*l.* should be paid, or it should be lawful for the plaintiff to put an end to the license.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. This was an action of covenant on an indenture by which the plaintiff gave a license to the defendant to work a patent for improvements in a machine or apparatus. The plaintiff by his declaration claimed 2000*l.* per annum for a certain period, stated in the pleadings, on the ground that the agreement between the parties was for a minimum rent. There was a stipulation in the indenture that the plaintiff should have certain royalties; but it was contended on the part of the plaintiff, that the meaning of the parties was, there should be a minimum rent. Now, the part of the indenture on which that question arises is as follows: [His lordship read the passage set out above.] The question submitted for the opinion of the court is substantially this, whether that word "or" is to be read "and;" that is, whether there was a stipulation for a minimum rent, with an additional clause that if it was not paid the license might be put an end to; or whether it is to be read as an alternative, that, if the party chooses to pay, the license will continue; or, if he does not pay, that then the plaintiff shall have the power to put an end to it. We are of opinion, there being only these two alternatives, and the word "or" occurring in the way in which it does, that we are bound to give effect to the plain, obvious, and grammatical meaning of these expressions. I abstain from noticing altogether the suggestion that was made in the course of the argument, as to the form in which this appeared when it was in draft. That ought certainly not to bear on the mind of any of the court, and I must say, so far as my judgment is formed, it has no operation whatever. Long before that matter was stated, perhaps not quite correctly, I had come, and I believe we have all now come, to the conclusion that this is the true grammatical, and therefore, if there be no reason for deviating from it, the true legal meaning of the expressions used between the parties; and I must for myself say, I think it is by far the most reasonable conclusion to come to. In the case of a patent, the patentee may very well say, If I grant you a license which, in substance, is an exclusive license, reserving to myself a certain royalty or share; if I find that that does not amount to a certain sum, then you shall either make that sum up to me, or I shall have the power of putting an end to the license. It merely means this: I think the invention is of great utility, it may be of great profit; and if it turns out that you, either from a want of spirit or industry in pressing it, or a want of attention to business, or for any reason, do not make it available, so that my royalty is gone, then I claim to myself the power of taking it from you and carrying the invention to some other person who probably will make more use of it. For myself, I think it is far more reasonable to suppose the parties came to that agreement, than that they came to a stipula-

In re Dearden.

tion for a minimum rent of 2000*l.* per annum, without being at all confident that the invention would produce 500*l.* In general, the court, in construing agreements as well as in construing acts of Parliament, I think, is bound to put on the passages met with, whether in an agreement or a statute, that meaning which is the plain, clear, obvious result of the language made use of. In the present case it happens, so far as my judgment goes, that the meaning we affix to the words used by the parties is also by far the most natural and probable agreement the parties would have made under the circumstances. Our judgment, therefore, will be for the defendant.

Judgment for the defendant.

In re DEARDEN, Gentleman, One, &c.¹

November 19, 1850.

Attorney—Alteration of Name of, on the Roll.

On the application of an attorney to be allowed to substitute the name of J. Heaton D. on the roll of attorneys in the place of J. D., the court directed the master to enter on the roll opposite the name of J. D. a memorandum, that by rule of this court J. D. should be known by the name of J. Heaton D., and that the master should be at liberty to make such indorsement of such alteration of the name on the admission of the applicant.

ATHERTON moved for a rule directing the master to substitute the name of Josiah Heaton Dearden on the roll of attorneys of this court in the place of Josiah Dearden, or that the master should be at liberty to make an indorsement of such alteration of name on the admission of the applicant.

A rule had been obtained in the queen's bench and common pleas ordering the name of Josiah Dearden on the roll of attorneys to be altered by inserting the name of "Heaton" after that of Josiah, and that the master be at liberty to make an indorsement of such alteration on the admission of the party. The affidavit stated that the applicant had assumed the name of "Heaton," being the maiden name of his mother, from love and respect to her, and not from any improper motive.

*Per curiam.*² Let the rule be, that the master shall enter on the roll of attorneys, opposite the name of Josiah Dearden, a memorandum that, by rule of this court, Josiah Dearden shall be known by the name of Josiah Heaton Dearden, and that the master shall be at liberty to make an indorsement of such alteration of the name on the admission of the applicant.

Rule accordingly.

¹ 20 Law J. Rep. (N. S.) Exch. 80.

² POLLOCK, C. B., PARKE, ALDERSON, and PLATT, BB.

Doe d. Childe & others, Trustees of the Ludlow Charities, v. Willis.

DOE d. CHILDE & others, Trustees of the Ludlow Charities,
v. WILLIS.¹

November 5, 1850.

Grammar School — Schoolmaster — Discretion of Trustees — Appointment of Trustees.

By the provisions of a scheme for the management of King Edward VI.'s grammar school at Ludlow, duly confirmed by the lord chancellor, it was declared "that the trustees should have authority from time to time, upon such grounds as they should at their discretion in the due exercise and execution of the powers and trusts reposed in them deem just from time to time, to remove the master, usher, &c., from his office," subject, however, to certain formalities being observed:—

Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the grounds of his removal.

By an order, the lord chancellor, in whom the power of appointing new trustees was vested, referred it to the master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead or who had left the borough of L., and after his report such further order was to be made as was just. The master reported that he had approved of eight persons as fit and proper persons to be appointed, &c. This report was confirmed, and in the confirmation the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private act the property of the trust was vested in the trustees for the time being without any deed of transfer:—

Held, that this was a valid appointment of the eight new trustees by the lord chancellor.

EJECTMENT for certain houses and premises occupied by the defendant as head master of the Ludlow grammar school of King Edward VI.

At the trial, at the Shropshire Summer assizes, before Williams, J., it appeared that the lessors of the plaintiff claimed as trustees of the Ludlow municipal charities. The school in question was founded by charter of Edward VI., dated the 26th of April, 1552, the powers of appointment and amotion being thereby given to the old corporation of Ludlow. These powers, and generally the power to make orders for the administration of the charity, were, by the 5 & 6 Will. 4, c. 76, s. 70, transferred to the lord chancellor. In pursuance of this authority, it was, by order of the lord chancellor, dated the 26th of August, 1836, referred to Master Brougham to appoint new trustees for the said charity. By his report, dated the 16th of February, 1837, he appointed seventeen persons to be such trustees, (nine of whom were lessors of the plaintiff,) and this order was confirmed by the lord chancellor, on the 3d of December, 1837.

On the 25th of July, 1838, the defendant was duly appointed head master of the school, and entered upon his duties. An information was for many years pending as to the administration of the charities, to compromise which a private act, 9 & 10 Vict. c. 18, was passed on the 27th of July, 1846, by which the trustees were to hold the property upon the uses and trusts to be declared by a scheme to be

¹ 20 Law J. Rep. (N. S.) Exch. 85.

Doe d. Childe & others, Trustees of the Ludlow Charities, v. Willis.

settled by the master.¹ This scheme was duly settled and confirmed on the 2d of August, 1848.

On the 20th of May, 1848, an order was made by the lord chancellor referring it to Master Brougham to approve of eight fit and proper persons *to be appointed* trustees of the said charities in the place of those dead and having quitted the borough of Ludlow, and after his report such further order was to be made as was just. On the 28th of February, 1849, the master made his report, and after reciting (*inter alia*) that eight persons (naming them) had been proposed as fit and proper persons to supply the vacancies existing among the trustees, he reported that he approved of the said persons as fit and proper persons *to be appointed* trustees of the charities affected by the 71st section of the 5 & 6 Will. 4, c. 76, in the place of those dead and having quitted the borough.

By an order of the lord chancellor, dated the 28th of April, 1849, it was ordered that the master's report should be confirmed; and it was further ordered that the trustees of the said charities (naming the nine old and the eight new trustees) do pay the costs of the petition for the appointment of the new trustees, out of the surplus funds in their hands belonging to the said charity, called the "Free Grammar School." The trustees met frequently in the course of the year 1849, and passed certain rules as to the management of the school. Disputes occurred between them and the defendant, and on the 16th of January, 1850, a special meeting was called pursuant to a notice addressed to the secretary, stating that it was intended to propose the removal of the defendant from the mastership. The meeting took place, and the resolution for his removal was carried, and signed by fourteen of the trustees, and the grounds thereof stated. All the formalities required by the 14th rule of the scheme were fulfilled.²

¹ The 25th section of the act enacted, "That in the construction of this act the word 'trustees' shall, when used with reference to the said charity property, be deemed and taken to mean and comprise the persons who from time to time shall be the trustees of the said charity; and that when and so often as any person or persons shall have been duly appointed trustee or trustees of the charity property, real or personal, then and in every such case by virtue of such appointment alone, and without any deed or instrument, conveyance, surrender, or assignment whatsoever for that purpose, all the property, real or personal, belonging to the said charity shall forthwith be and be deemed to be vested in such new trustee or trustees as aforesaid, either alone or jointly with the surviving, continuing, or other trustee or trustees of any of the same property upon and for the trusts and purposes of the said charity."

² That rule was as follows: "That the said trustees shall have authority from time to time, upon such grounds as they shall at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just from time to time, to remove the master, usher, or any additional master or masters, or either of them, from their or his offices or office in the manner hereinafter mentioned, that is to say, that on a requisition in writing, signed by three of the trustees at least, the secretary of the said trustees shall call a meeting of the said trustees, a notice in writing being given or sent to each of the said trustees six days before the holding of such meeting; and in such notice it shall be stated that at the said meeting it is intended to propose the removal from the said office of master, usher, or additional master or masters, the person whose name shall be in the said notice; and at the same meeting there shall be present not less than two thirds of the trustees for the time being; and at the said

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The defendant had not, however, any notice of the meeting, or any opportunity afforded to him to answer the charges, which he alleged were untrue in fact. By letter dated the 18th of February, 1850, he claimed the right to be heard in his defence, and he was allowed to be present at the meeting held on the 20th of February, pursuant to the said 14th rule, to confirm the resolution. Some discussion took place, but no regular inquiry into the truth of the charges, and the resolution was confirmed, the confirmation being signed by the same fourteen trustees who had signed the resolution. A demand of possession of the school-house and premises was subsequently made, and upon refusal this action was brought. Proceedings in equity had been taken by the defendant, but an injunction was not obtained.

Upon these facts, and no evidence being offered as to the truth or sufficiency of the charges against the defendant, it was objected that the resolution to remove Mr. Willis was invalid, he not having had any notice of the charges, or any opportunity of defending himself before the resolution of the 16th of January was passed, and that it was incumbent upon the trustees to prove before the jury the sufficiency of the charges; and further, that the eight trustees were not duly appointed. A verdict was taken for the plaintiff, with leave reserved to the defendant to enter a nonsuit.

Whateley now moved accordingly. The chief question is, whether these trustees had the absolute power to remove the defendant at their discretion.

[*Parke, B.* The words in the 14th rule seem to give an uncontrolled power, as was held in *The Queen v. The Darlington School*, 6 Q. B. Rep. 682; s. c. 14 Law J. Rep. (N. S.) Q. B. 67.]

In *The Fremington School Case*, 10 Jur. 512, where the power to displace was given "upon any neglect or misbehavior, or other just cause for which the trustees should agree upon and think fit," it was held that the master was entitled to be heard upon the inquiry against him, and that the trustees were bound to exercise their power according to the principles of right and to the general rules of administering justice by the law of England.

[*Parke, B.* Here the words are upon such grounds as the trustees "shall deem just." There may be many cases in which it may be

meeting a resolution shall be proposed by one and seconded by another of the trustees, for the removal of such master, usher, or additional master or masters, and that if the same be carried by at least two thirds of the trustees so present, the same shall be entered on the minutes of the said trustees, and signed by such of them as vote for the said resolution; and that if the said resolution shall, at a subsequent meeting of the said trustees called by such notice as last hereinafter mentioned, and in which notice shall be set forth the former resolution, and at an interval of one calendar month at least whereat the same proportion of trustees at least shall be present as is required to be present at the first meeting, be confirmed by two thirds of the said trustees then present, the said master, usher, or additional master or masters shall be considered as removed as on the day of the said second meeting, and his office shall be vacant on and from that day; provided that such resolution and the confirmation of it as aforesaid, together with the grounds of such removal, shall be entered and preserved upon the minutes of proceedings of the said trustees."

Doe d. Childe & others, Trustees of the Ludlow Charities, v. Willis.

expedient that the master should be changed, although he may not have been guilty of any misconduct. The rule itself seems to provide against a hasty and ill-considered removal, because the grounds are to be stated.]

Then, as to the validity of the appointment of the trustees. The master, by the first reference, was to appoint the trustees, and he did appoint them, and his order was confirmed; but on the second occasion it was merely a report as to the fitness of the parties named, and a further order was contemplated. Nor were there eight vacancies, for absence from the borough was not of necessity a disqualification.

[*Pollock, C. B.* It is not necessary that there should be a disqualification; it is sufficient if the lord chancellor considers that there is an objection to their continuance as trustees.]

There should have been a distinct appointment.

POLLOCK, C. B. I am of opinion that there should be no rule. The opinion of the court has already been expressed that the power of removal is discretionary with the trustees, and it has been exercised in due form. As to the second objection, the lord chancellor has absolute power to appoint or displace the trustees, and then the 25th section supersedes the necessity of any deed to vest the property in the new trustees. It is then referred to the master, and he reports that the eight persons named should be substituted, and the lord chancellor, in effect, says, "I adopt the finding of the master," and in the order they are treated as trustees having authority over the funds.

PARKE, B. I am of the same opinion. The power of removal is clearly discretionary. The removal was, however, improper if upon the evidence it appears that the trustees were not rightly appointed. By the municipal corporation act, the power to appoint is given to the lord chancellor, and the private act vests the estate in the trustees duly appointed. The reference is to the master to approve of eight persons fit to be appointed in lieu of eight others; and he does so approve, and his report is confirmed. If there had been an express order by the lord chancellor, there could have been no objection raised. But it is clear that this amounts to an appointment. The new trustees are directed to pay out of the funds certain costs, which shows that it was intended that the property should vest in them. It might have been more formally done, but it is a valid appointment.

ALDERSON, B. According to the terms of the scheme, the trustees have an unlimited discretion subject to the performance of the conditions therein specified. The order for the appointment of the new trustees is quite valid, although it would have been better to have made an express appointment. Probably the form was used when a deed was necessary to complete the appointment, and it was not altered after a deed became unnecessary. The lord chancellor says,

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in substance, "I approve of the master's choice, and direct them to be the trustees."

*Rule refused.*¹

SKINNER v. THE LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY COMPANY.²

November 8, 1850.

Railway Company — Negligence — Passenger for Hire.

A declaration against a railway company alleged that the plaintiff, at the request of the defendants, became a passenger for hire in one of their trains, for reasonable reward to the defendants in that behalf: and that in consequence of the carelessness, negligence, and want of skill of the defendants and their servants, the train ran against another train on the line, whereby the plaintiff was injured. The defendants pleaded the general issue, with a traverse of the plaintiff being a passenger, &c. At the trial it appeared that the train in question was hired of the company by a society for an excursion, the tickets for which were sold and distributed by the secretary of the latter body, from whom the plaintiff purchased his, and that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line:—

Held, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants; and,—

Secondly, that there was evidence to go to the jury in support of the allegation that the plaintiff became a passenger for hire with the company.

THIS was an action for negligence. The declaration stated that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, being one of a train of carriages of the defendants drawn by a locomotive engine of the defendants, to be by them safely and securely carried and conveyed from Brighton to London, for reasonable reward to the defendants in that behalf, and the defendants then received the plaintiff as such passenger as aforesaid, and thereupon it then became and was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff on the said journey. It then proceeded to aver that they did not use due or proper care or skill, &c., in consequence of which, and by and through the mere carelessness, negligence, and improper conduct of the defendants and their servants in that behalf, the train of carriages in which the plaintiff was such passenger as aforesaid and the locomotive engine then drawing the same, &c., ran and struck against a certain other train of carriages then being in and upon the said railway, whereby the plaintiff was injured, &c. The defendants pleaded the general issue, with a traverse of the plaintiff being such passenger, &c. At the trial before the lord chief baron, it appeared that on the occasion in question a body called the

¹ In the suit instituted by the defendant against the trustees of the school, the master of the rolls gave judgment on the 14th of January, 1851, to the effect that the trustees had no right to remove the defendant without having given him an opportunity to defend himself; and restrained them from enforcing the resolution of removal of the 6th of January, 1850. See the case reported 20 Law J. (N. S.) Chanc. p. 113. 2 English Rep. 41.

² 15 Jur. 299.

Skinner v. The London, Brighton, & South-coast Railway Company.

"Printers' Pension Society" had hired a train of the company for the purpose of making an excursion from London to Brighton and back. The tickets for the excursion were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one. On the return from Brighton to London, the train, it being then dark, ran into another train which was standing still at an intermediate station on the line of railway, and thus caused the accident complained of. On this evidence the attorney general for the defendants objected that there was no evidence of the plaintiff being a passenger for hire with the company; but the judge overruled the objection, reserving leave to move to enter a nonsuit on the point. The case then proceeded, and the judge directed the jury that the fact of the accident having occurred was *prima facie* evidence of negligence to fix the defendants. *Carpue v. The London and Brighton Railway Company*, 5 Q. B. 747; 8 Jur. 464, was referred to. The jury having found for the plaintiff,—

Bramwell now moved for a new trial on the ground of misdirection, and also on the point reserved. First, the judge at *nisi prius* put the *onus probandi* on the wrong party. The plaintiff complaining of negligence on the part of the company, it lay on him to show the nature of that negligence, instead of which he confined himself to proof of the accident.

[*Pollock*, C. B. If A tumbles against B, *prima facie* he is responsible; but if it were proved that he did so in consequence of a fit of apoplexy, he would not be responsible. So here, there is a collision between two trains of this company, that is *prima facie* some evidence of negligence on their part.]

The fact was (although this was not proved at the trial) that no skill could have prevented the accident, as the train standing at the station was inevitably kept there by a luggage train before it which had broken down.

[*Alderson*, B. Was it not negligence to run the trains so close?]

There was no evidence to show at what intervals they ran.

[*Alderson*, B. This is not the case of two vehicles belonging to different persons running against each other, where no negligence can be inferred against either party in the absence of evidence as to which of them was to blame. But here all three trains belong to one company, and whether the accident arose from the trains running at too short intervals, or from the mismanagement by their servants of any of those trains, or of their officers at the station in not sending to stop the train that was coming on, they are equally liable. It was not necessary for the plaintiff to trace more specifically where the negligence lay; and if the accident arose from some inevitable fatality, it lay on the company to show it.]

Secondly, the allegation in the declaration that the plaintiff at the request of the defendants became a passenger in their train for reasonable reward being traversed, the plaintiff was bound to prove a contract with the company to that effect. Now that was not only not established, but was negatived by the evidence, which shows that his contract was made with the Printers' Pension Society.

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[*Platt*, B. Do you contend that the treasurer of that society was the proper person to sue the company?]

Perhaps he might have sued them; but at all events the plaintiff should have described the contract as it really was.

[*Alderson*, B. The company by giving their tickets to the treasurer of the society to distribute, constitute him their agent to contract with those who take the tickets.]

The court then said they thought there was evidence for the jury on both points, and therefore the rule must be refused.

Rule refused.

POWELL v. HOYLAND.¹

December 16, 1850.

Trover — Conversion — Obtaining Possession by putting in Fear.

A having lawfully received certain bills of exchange from B, a trader, C came to him, and stating that he was acting on behalf of Messrs. Y. & Co., creditors of B, demanded the bills from A, and upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that if they were not, A would be compelled to give them up by the commissioner, and the expense would cost A 200*l.*, and the commissioner would be very angry. A was at the time ill in bed, and, being greatly alarmed, gave up the bills:—

Held, that this was no conversion by C, as trespass would not have been maintainable for the taking under these circumstances.

It appeared, however, that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding this, he delivered them to Messrs. Y. & Co.:—

Held, that this was a conversion.

TROVER for certain bills of exchange.

Plea — Not guilty.

At the trial, before Cresswell, J., at the Cheshire Spring assizes for 1850, it appeared that the plaintiff had been in partnership with a Mr. Dathan, and on the dissolution in 1849, the plaintiff's share in the business was ascertained to be 800*l.*, and bills for that amount at various dates were given to him by Dathan, who continued the business. In November, Dathan being in difficulties, left his place of business, and was just about to leave the country, when he was stopped by some of his creditors, and proceedings were about to be taken by Messrs. Yates & Co. to make him bankrupt. It being known that some of the bills were in the plaintiff's possession, Messrs. Yates & Co. sent the defendant to demand them, it being supposed that the plaintiff's right to them could be impeached, although upon the evidence at the trial it was clear that he was entitled to them.

The mode in which the bills were obtained was thus detailed in

¹ 20 LAW J. Rep. (N. S.) Exch. 82.

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the evidence of Mrs. Phillips, the sister of the plaintiff: "The plaintiff was ill in bed when the defendant came. The defendant asked if Mr. Powell lived there, and I said he did. Mrs. Powell said he was too ill to be seen. The defendant said he must see him, as he had come on business. She said, Where from? He said, from Manchester, and that he was come for some bills (the bills now in question) that Mr. Dathan had given to him, (the plaintiff.) The defendant said he must take the bills back with him; that if he did not, the creditors would have about 3s. 4d. in the pound less to receive. Mrs. Powell said, 'Phillips, come up with us,' and they all went to the plaintiff's room. The defendant told the plaintiff he had come for those bills. The plaintiff said, They are my own property; I have no right to give them up to you. The defendant said, You must give them up. I must take them back with me, or else they will make Mr. Dathan bankrupt as soon as I return home. The plaintiff said, I do not think I can give them up. Is there any one I can call in to consult with? I said I was a stranger, and did not know any one. Mrs. Powell said, There is no one but my brother, and he is not well. The defendant said, There is no time—I must return. The plaintiff said the notice was too short to part with such a large sum. The defendant said, he would be compelled to give them up, and the bankruptcy would cost Mr. Powell 200*l.*, and the expense would fall on him if he would not give them up, and the commissioner would be very severe with Mr. Powell. The plaintiff was then much agitated, and said he did not know what to do. He said he had never seen the defendant before, and that he gave them up to the defendant to be carried to Yates & Co. Hoyland got them, and took them away with him."

After this, a demand was made on the defendant, Hoyland, for the bills, by a witness who was subsequently called, and who said he saw the defendant and told him he had come to demand the bills which had been obtained surreptitiously from the plaintiff. The defendant said that after what had been said to him on the 1st of January, at Manchester, Messrs. Yates & Co. had no power to retain the bills, and he had made up his mind they would have to be given back; that they were not then in his possession. The witness further stated, "On the 1st of January, the defendant called on me in Manchester, and said he had been to the plaintiff and had obtained bills that Powell held, and I expressed my astonishment that the plaintiff should have parted with them. I told him he had no right to the bills whatever. Mr. M., representing Yates & Co., was with him. I explained the manner the bills had been obtained from Dathan, and the consideration for them, and that they had no more right with them than I had; the defendant said they conceived the bills had been obtained by fraudulent preference."

The learned judge thought that the original taking of the bills was, under the circumstances, a conversion, and so directed the jury, and a verdict was found for the plaintiff. A rule was subsequently obtained to set aside this verdict and for a new trial, against which

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Welsby and *Atherton* showed cause.¹ The misdirection complained of is, that the learned judge ought to have told the jury that there was no evidence of conversion. But there was no doubt that the plaintiff was entitled to the bills, and the defendant obtained the bills from the plaintiff, being in an infirm and weak state of body and mind, by importunity and threats, amounting to duress in point of law. There was no voluntary delivery. It resembles the case of *Grainger v. Hill*, 4 Bing, N. C. 212; s. c. 7 Law J. Rep. (N. S.) C. P. 85, where trover was held to be maintainable to recover a ship's register, which had been obtained from the plaintiff by means of an arrest under a *capias*, which had been issued ostensibly for a debt, but in reality to frighten the plaintiff into giving up the register.

[*Parke, B.* Would trespass have been maintainable for this taking?]

It is submitted that every wrongful taking is a trespass, and that a consent obtained by fraud and menaces is no consent. Thus, if goods are bought, but the vendee has never had any intention to pay for them, the property does not pass. *Load v. Green*, 15 Mee. & W. 216; s. c. 15 Law J. Rep. (N. S.) Exch. 113. So, a seeming consent obtained by fraud will not prevent an act from being criminal. *The Queen v. Case*, 19 Law J. Rep. (N. S.) M. C. 174. Suppose the owner of a chattel to have been made drunk by a person on purpose, and while in that state to have given the chattel into the hands of that person, no property would pass.

Pulling, contra. The facts in *Grainger v. Hill* were very different. In that case there was an actual arrest; here the defendant only gives his opinion of what the law is, and tells the plaintiff, if you do not do as I tell you, you will suffer for it, and be liable to great expenses. It might as well be said, that an attorney who writes a threatening letter before bringing an action and obtains payment in consequence, obtains it tortiously.

Curr. adv. vult.

Judgment was now delivered by

PARKE, B. His lordship, after stating the facts and evidence as above, proceeded. The bills were undoubtedly the plaintiff's, and we are all clearly of opinion that the original taking of these bills did not constitute a conversion, for there was no taking under duress that would constitute a conversion, inasmuch as there was nothing to support an action of trespass. There was no proof of any duress whatever, because a mere statement that the plaintiff might have to pay 200*l.*, and would probably have the expense of the commission to pay, is no duress at all so as to vacate any promissory note or bond given on the ground of duress; nor is it enough to make the obtaining goods by such a threat itself an illegal act of trespass, so as to make it a conversion. We also think there is no evidence in the original transaction of any fraud committed by the defendant so

¹ December 3, before *PARKE, ALDERSON, PLATT, and MARTIN, BB.*

Powell v. Hoyland.

as to enable the plaintiff to recover upon that ground; that is, supposing that if goods were obtained by fraud, an action of trespass would lie for taking them, which is a very doubtful matter. My impression is, it would not; because fraud does transfer the property, liable to be divested by the person affected if he chooses to consider the property as not being divested; it does transfer the property at the time; and the parties taking the property by fraud would not be liable to an action of trespass.¹ But there is no evidence in the case of any fraud in the original transaction. The common pleas decided, in *Grainger v. Hill*, that where a ship's register had been obtained from a captain of a ship by arresting him for a debt, the object of arrest being to get the register from him, an action of trover might be maintained; but the court proceeded on the ground that it was an illegal duress. Whether it was an illegal duress is another question. They proceeded on the ground that the register was obtained by duress and imprisonment. That differs from the present case, because here there was no imprisonment at all. Therefore, upon the original transaction we are all clearly of opinion that there was no sufficient trespass, and therefore no conversion. It was admitted in argument, and rightly admitted, that unless this original act of taking would have subjected the defendant to an action of trespass, it could not be a conversion in an action of trover.

There is, however, a part of the case on which we will defer our judgment until we have consulted the learned judge; that is, whether or not the bills were in the possession of the defendant at the time the explanation was made to him, on the 1st of January, of the circumstances, that the plaintiff was clearly entitled, and that they were delivered to him under a misapprehension. If that took place before the bills were delivered to the defendant's employers, Yates & Co., it may possibly amount to a conversion. If that notice was not given until after they got into the possession of Yates & Co., then it was too late, because the defendant was certainly not guilty of a conversion by handing over the bills of exchange to his employers. There is no doubt, although the defendant did not receive these bills for himself, but as the agent for Yates & Co., he would be liable in an action of trover if the facts show a conversion. Of that there is no doubt. We will consult the learned judge on the point, and intimate our opinion on the first day of next term.

His lordship, in Hilary term, said, We find that my learned brother Cresswell did proceed not only upon the original taking, but he also went upon the ground that there was evidence of a subsequent conversion, inasmuch as, whilst the defendant had the bills in

¹ Where property is delivered upon a sale made under false and fraudulent representations by the vendee, the property passes, notwithstanding the fraud, subject to the right of the vendor to reclaim it, if he determines to rescind the contract. *Parker*

v. Patrick, 5 Term R. 175. *Rowley v. Bigelow*, 12 Pick. 306. *Hoffman v. Noble*, 6 Met. 68. *McCarty v. Vickery*, 12 John. 348. *Hollingsworth v. Napier*, 3 Caines, 182. *Somes v. Brewer*, 2 Pick. 184. *Mowrey v. Walsh*, 8 Cowen, 238.

Humphreys v. Jones & Pickering.

his hands, the transaction was explained to the defendant, and he was told that he had no right whatever to the bills, and the property in them belonged to the plaintiff, and notwithstanding that he afterwards handed them over to his employers. It was not quite clear, from my learned brother's report, whether, at the time of the communication that he had no title to the bills, he had the bills in his possession or had handed them over to his employers. It turned out that the communication was made whilst he had the bills in his possession, and when he knew that he clearly had no title to them. Therefore, the handing the bills over afterwards to Yates & Co., the defendant having no title to them, was a conversion by him; therefore, my brother Cresswell's ruling was right, and the rule must be discharged.

*Rule discharged.*¹

HUMPHREYS v. JONES & PICKERING.²

December 5, 1850.

Contract — Completion of Railway Works.

The plaintiff and defendants entered into an agreement with a railway company to execute a contract, for making a tunnel upon a line of railway, called "the Morley contract." The plaintiff then assigned to the defendants all his right and interest in the contract, and the defendants agreed to pay a given sum to the plaintiff upon the completion of the contract. Subsequently, it became necessary to vary the levels, and the defendants agreed with the company to make the tunnel in a different direction from that specified in the Morley contract, and upon different terms as to payment:—

Held, that the plaintiff had no right to sue the defendants for the sum stipulated to be paid to him by the agreement, as the Morley contract never was completed.

ASSUMPSIT. The declaration, after reciting that the plaintiff and the defendants had entered into a certain contract, called the "Morley Contract," with the Leeds, Dewsbury and Manchester Railway Company, for the execution of certain works, for a large sum, to wit, 176,356*l.* 6*s.* 8½*d.*, stated that, by an agreement entered into between the plaintiff and the defendants, in consideration (*inter alia*) that the plaintiff would relinquish and give to the defendants all his right and interest in the said contract, and execute such deed of assignment as should be necessary, the defendants thereby then agreed to pay unto plaintiff the sum of 2438*l.* 8*s.* 6*d.*, in manner following, (that is to say,) 1938*l.* 8*s.* 6*d.* on the 10th of December, 1845, and the remaining sum of 500*l.* on the completion of the said contract. Averment of mutual promises and performance by the plaintiff of his part of the

¹ An abuse of lawful possession, or any act inconsistent with the owner's right of property or of possession, as a sale, or a delivery of goods to a third person contrary to the orders of the owners, by one intrusted with the goods of another, is a conversion.

Sydes v. Hay, 4 Term R. 260. *Lockwood v. Bull*, 1 Cowen, 322. *Shotwell v. Fes*, 7 John. 302. *Murray v. Burling*, 10 John. 172. *Portland Bank v. Stubbs*, 6 Mass. 422.

² 20 Law J. Rep. (N. S.) Exch. 88.

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agreement. Breach, that although the said contract was before the commencement of the suit, to wit, &c., completed, and although the defendants had paid 1938*l.* 8*s.* 6*d.*, according to the agreement, yet they had not paid the residue.

The defendants severed in their pleas, and the defendant Jones demurred, and judgment was given for the plaintiff. The defendant Pickering pleaded, thirdly, that the said contract was not completed *modo et forma*.

Issue thereon.

At the trial before Parke, B., at the Cheshire Summer assizes for 1850, it appeared that the contract was for the making a tunnel upon the line of railway, and that after the original contract had been entered into with the company, and after the making of the agreement between the plaintiff and the defendants as stated in the declaration, it was found necessary to alter the levels, and the Morley contract was given up by agreement between the railway company and the defendants, and another tunnel was executed, and a sum of 200,000*l.* contracted to be paid for it, 180,000*l.* to be paid in the course of the work, 10,000*l.* upon the completion of the tunnel, and 10,000*l.* was to be retained until the expiration of a year after the completion of the tunnel, during which period the contractors were to maintain it in repair, which year had not expired before the commencement of the action. It was objected upon this evidence that the plaintiff was not entitled to recover, and his lordship so held, and a verdict was entered for the defendant upon the third issue. A rule had been subsequently obtained, pursuant to leave reserved, to enter the verdict for the plaintiff; against which

Chillon and *Davison* showed cause. The verdict was right on two grounds; first, the contract, that is, the Morley contract, never was completed at all, and the substitution of another contract did not give the plaintiff the right to recover in the present action; secondly, even if the substituted contract could be treated for this purpose as the Morley contract, it was not completed until the expiration of the twelve months during which the works were to be maintained in repair.

Welsby, contra. Looking at the circumstances under which the agreement was made, and the subject matter of it, the reasonable construction is, that the contract is completed when the arrangement between the defendants and the railway company are carried into effect. Here, the object contemplated by the Morley tunnel was obtained by another tunnel, but executed by the defendants, and payment received by them. The plaintiff is not to lose all benefit because they choose to vary the line. The non-payment of the last 10,000*l.* is immaterial, for the liability to keep in repair does not prevent the contract from being considered as completed.

PARKE, B. The Morley contract must be completed, which it never was.

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ALDERSON, B. You ask us to try and do you justice by giving a fanciful meaning to the word "completed." The event contemplated by the parties at the time of the making of the agreement has not happened. You may have some claim for damages, but you cannot recover upon the contract.

PLATT and MARTIN, BB., concurred.

Rule discharged.

MACRORY v. SCOTT.¹

December 3, 1850.

Frauds, Statute of — Agreement to pay the Debt of Another — Memorandum in Writing.

Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott, Brothers, for moneys advanced by the plaintiff to them; that after the judgment recovered the plaintiff settled with Scott, Brothers, and that there was nothing due upon the judgment for moneys advanced. Replication, that after judgment recovered an indenture was executed between the plaintiff and Scott, Brothers, whereby, after reciting the judgment and various disputed accounts, an agreement was made between the plaintiff and Scott, Brothers, for the settlement of all disputes, by which it was agreed (*inter alia*) that the plaintiff should advance 800*l.* to the Ulster Banking Company, which he had guarantied to them, and 200*l.* to Scott, Brothers, and that the debt from Scott, Brothers, should be fixed at 1000*l.*, and that the agreement should be without prejudice to the security of the said judgment against the defendant. Averment, that after the making of the said indenture, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised that the said judgment should stand security for the repayment of the said sum of 1000*l.* and interest. Averment of performance by the plaintiff, and that the said sums of 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder, traversing the promise, *modo et forma*. Issue thereon. To prove this issue, the plaintiff put in the following letter from the defendant and another surety, dated before the execution of the deed by the plaintiff: "We hereby consent to the within deed being executed by and between the parties, without prejudice to the rights and remedies of the plaintiff, &c., under his judgment for 10,000*l.*, to recover the sum of 1000*l.*," &c. This letter had been annexed to the deed, and was intended to have been sent therewith to the defendant for signature; but the letter alone was sent, and the defendant signed it without seeing the deed.

Seemle, that this was not a promise to pay the debt of another within the statute of frauds; but that if it were, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise; and, —

Held, that the issue was rightly found for the plaintiff.

DEBT, upon a judgment for 10,002*l.* 13*s.*, recovered by the plaintiff against the defendant in the court of exchequer in Ireland, and upon an account stated.

The defendant pleaded, thirdly, that at the time the said judgment was recovered, as in the first count mentioned, he, the defendant, was not indebted to the plaintiff in any sum or sums of money whatsoever,

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and that the said judgment, in the said first count mentioned, was so recovered by the plaintiff against the defendant with the defendant's assent, as a surety only, and not otherwise, for certain other persons, that is to say, one Peter Scott, one John Scott, and one Thomas Scott, hereinafter described as Scott, Brothers, to secure the due payment by the said persons to the plaintiff of any sum or sums of money which the said persons at the time of the said recovery owed, or which they at any time might thereafter owe to the plaintiff for and in respect of moneys advanced or to be advanced by the plaintiff to them. That the said Scott, Brothers, after the said recovery, and before, &c., to wit, &c., settled, paid, satisfied, and discharged all moneys then due and owing from them to the plaintiff, for which the said judgment was such security as aforesaid, and the plaintiff then accepted and received such settlement, payment, satisfaction, and discharge of such moneys, and before and at the time of the commencement of this suit there was not any sum or sums of money due or owing to the plaintiff from the said Scott, Brothers, for and in respect of any moneys at any time advanced by the plaintiff to those persons for which the said judgment was to be such security as aforesaid. Verification.

Replication, that after the recovery of the judgment, an indenture, dated the 3d of October, 1846, made between Scott, Brothers, of the one part, and the plaintiff of the other, was executed, *profert*, which recited, that expenses had been incurred by the plaintiff for the said Scott, Brothers, and advances made to them, and an agreement made to secure the said advances by the joint and several bond of Scott, Brothers, and the defendant and W. Trowsdale as sureties; and that the said parties had given their joint bonds and warrant of attorney for 10,000*l.*, and that the said Scott, Brothers, had deposited leases with the plaintiff, and that further advances had been made by the plaintiff, and moneys received by him on account of Scott, Brothers, and that the plaintiff had been employed as attorney in a suit by Scott, Brothers, against the Dublin and Drogheda Railway Company; that on the 1st of June, 1845, an account between them and the plaintiff was come to, when Scott, Brothers, were found to be indebted in 2700*l.* including the plaintiff's costs, which account was signed by them and the plaintiff; that thereupon, for further securing the 2700*l.*, and in consideration of a letter of guaranty to the Ulster Banking Company enabling Scott, Brothers, to obtain advances, not exceeding 800*l.*, Scott, Brothers, executed a power of attorney to the plaintiff, to receive all moneys due from the railway company to them, but without prejudice to the securities held by the plaintiff; that according to a previous agreement, a counter guaranty from Messrs. Connell & Sons to the plaintiff was procured by Scott, Brothers; that Scott, Brothers, sued the Dublin and Drogheda Railway Company, and recovered 2799*l.* 14*s.* 3*d.*, which amount was paid to the plaintiff, still leaving a large sum due to him in addition to the 800*l.*, which had been advanced to the Ulster Bank; that Scott, Brothers, changed their attorney, and required the plaintiff to furnish his bills of costs, which amounted to 1245*l.* 12*s.* 11*d.*; that they were not taxed, but the plaintiff received 500*l.* costs from the railway company; that in

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consequence of disputes as to the various transactions, it had been agreed to come to a final settlement.

And by the said indenture it was witnessed that, for the sake of winding up the said transactions, Scott, Brothers, jointly and severally covenanted with the plaintiff, and the plaintiff with them, for the performance of the agreement therein contained, namely, first and secondly, that they should execute mutual releases; thirdly, that the plaintiff should receive all costs then payable by the Dublin and Drogheda Railway Company to Scott, Brothers; fourthly, that the plaintiff should look to the company alone for his costs in the action, and make no further claim upon Scott, Brothers, in any way relative to costs; fifthly, that Scott, Brothers, should not tax the bills or question the accounts; sixthly and seventhly, that the plaintiff should advance 800*l.* to the Ulster Banking Company and lend 200*l.* to Scott, Brothers, and thenceforth the sum of 1000*l.* should be considered as the amount in which Scott, Brothers, were indebted to the plaintiff, which sum was to carry interest at 6*l.* per cent.; eighthly, that this agreement should be without prejudice to the security afforded to the plaintiff by the aforesaid equitable mortgage, and, so far as the parties could, to the aforesaid counter guaranty from Messrs. Connell & Sons, and to the aforesaid securities from the defendant and W. Trowsdale, and the aforesaid sum of 1000*l.*, with interest, should remain secured by the said equitable mortgage, and the judgments against the Scott, Brothers, and, so far as the parties thereunto could, by the said judgments against the defendant and W. Trowsdale, and also, to the extent of the said guaranty so paid to the Ulster Banking Company, by the said counter guaranty from Messrs. Connell & Sons; ninthly, the said Scott, Brothers, also agreed, if thereunto required by the said plaintiff, to do their best to procure from the defendant, W. Trowsdale, and Messrs. Connell & Sons, a recognition of the aforesaid eighth article, and an assent to allow their aforesaid several securities to remain so charged and chargeable as aforesaid; tenthly, that Scott, Brothers, would pay the 1000*l.* to the plaintiff.

The replication then stated, that after the making of the said indenture, and before the execution thereof by the plaintiff, and before the commencement of this suit, to wit, &c., in consideration that the plaintiff, at the request of the defendant, would execute the said indenture, and would forthwith advance to the said Ulster Banking Company the said sum of 800*l.* so guaranteed by him on behalf of Scott, Brothers, and would forthwith advance and lend to the said Scott, Brothers, the said further sum of 200*l.*, he, the defendant, then promised the plaintiff that the said judgment should stand and remain in full force against him, the defendant, as a security to the plaintiff for the repayment to him of the said sum of 1000*l.* and interest, in the said indenture mentioned. Averments of the performance by the plaintiff of his agreement, and that he advanced to the Ulster Banking Company 800*l.*, and to Scott, Brothers, 200*l.*, but that Scott, Brothers, had not repaid the same, or any interest thereon; and that the defendant had notice thereof, and had been requested to pay, but had not paid the same. Verification.

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Rejoinder, that the defendant did not promise *modo et forma*. Issue thereon.

At the trial, before Maule, J., at the Surrey Summer assizes, 1850, the following letter was put in, dated the 3d of October, 1846, and signed by the defendant and W. Trowsdale, the other surety: "We hereby consent to the within deed being executed by and between the parties thereto, and that the same shall be without prejudice to the within-named Adam John Macrory's rights and remedies under his several judgments for 10,000*l*. entered, as well against us as against Peter Scott, John Scott, and Thomas Scott, respectively, in the queen's bench, in Hilary term, 1844, to recover thereunder the sum of 1000*l*. and interest, (now ascertained to be due on foot thereof,) notwithstanding the said deed, or any other dealings between the said parties, and therein more particularly referred to, and that the said judgments shall severally be and remain in full force and effect against each of us, our heirs, executors, and administrators, in order to secure the said sum of 1000*l*. and interest, so as aforesaid ascertained to be due. Witness our hands this 3d day of October, 1846."

This letter had originally been annexed to the deed stated in the replication, with the intention of its being sent to the defendant. It was, however, separated from the deed, and sent to him, with the following letter from Scott, Brothers: "We have now got a full settlement with Macrory, (the plaintiff.) He is to advance us some money, for which we have given him a bond for 1000*l*. He wants your name along with Trowsdale's, and if you will have the goodness to sign the enclosed and return in due course, we shall feel much obliged."

On the part of the defendant a letter was put in, signed by the plaintiff, and addressed to his legal adviser by way of instructions for the deed stated in the replication, which, after detailing the facts, contained the following passage: "A settlement of all matters in dispute has been agreed upon this day to the following effect: that I am forthwith to lift the guaranty of 800*l*. from the bank, so as to enable Scott, Brothers, to get discounts made. I am also to advance them 200*l*., so as to make the demand due to me even 1000*l*., and which is to be secured by the securities I hold, or at all events the 1000*l*. is to be the ascertained and settled account between us on foot of all the securities I hold, and each party is to release the other (save as to this 1000*l*.) from all demands, accounts, and reckonings of every kind, and I have stipulated that this arrangement is to be carried out in such manner as you may suggest." At the end of the letter was the following note: "I have read the foregoing letter, which embodies the basis of the arrangement which we are desirous of carrying out. (Signed) T. Scott, for Scott, Brothers. August 21, 1846."

There was conflicting evidence as to the letter of the 3d of October having been signed by the defendant before the execution of the deed, but the jury found that it was. It was then objected that the agreement, as stated in the replication, was not proved, and that it

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was for the payment of the debt of another within the statute of frauds, and there was no sufficient memorandum thereof in writing. His lordship overruled the objections, and a verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, and the court to have the same powers of amendment as the judge at *nisi prius*.

A rule had been accordingly obtained, against which

Shee, Serj., and *Willes* now showed cause. Without at present considering whether the plea is any legal defence, it is submitted that no note in writing was necessary, for the immediate object of the defendant's letter was not to guaranty the payment of the debt of Scott, Brothers, but related to a new arrangement with respect to his own liability upon the judgment. The deed showed that the intention of the parties was that there should be an additional security for the 1000*l.*, the sum agreed upon to be due, and that the settlement should be without prejudice to the existing securities held by the plaintiff, which included the judgment against the defendant. But if any note were necessary, the letter of the 3d of October is sufficient, because it incorporates the provisions of the deed, which the jury found was executed after the letter was signed by the defendant. The terms are, "We consent to the within deed." The consideration stated in the replication was also proved, or if any difficulty arises from the advance of the 800*l.* and 200*l.* being in pursuance of the previous agreement, that might be struck out.

Bovill, contra. Upon the facts and pleadings, it appeared that the judgment was given only as a security for advances, and that the advances had been repaid, and the object of the deed, as shown by the letter of the 6th of August, was to make the judgment a security for a new debt of 1000*l.*; but the defendant was no party to that, and he did not know the terms of the deed when he wrote the letter of the 3d of October.

[*Parke*, B. He consented to be bound by the deed as if he had seen it.]

By the sixth article, there is to be a new advance, and a promise to repay that must be in writing, and show the consideration, which the letter does not do.

[*Parke*, B. It incorporates the deed by reference.]

The defendant was no party to the deed, and could not have enforced performance, or compelled the plaintiff to advance the 800*l.* and the 200*l.*, and the letter is a bare consent. Further, the agreement is not proved. The consent is, that the deed should be executed, without prejudice to the existing securities, but not to extend the liability upon the judgment.

PARKE, B. I am of opinion this rule ought to be discharged. The question is, whether the contract is proved; that is, the consideration and promise as stated in the replication. It is said that it must be in writing, as being a promise to pay the debt of another within the

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statute of frauds; but I do not think so. The immediate object is to appropriate a fund secured by the judgment in a different manner, although the performance would have the effect of paying the debt of Scott, Brothers. It is like the case of *Castling v. Aubert*, 2 East, 325. It is, however, unnecessary to decide this, because I am of opinion that there is a sufficient memorandum in writing. A memorandum is prepared to be indorsed on the deed, and referring to it, which is to be signed by the defendant. Now, if that had been so indorsed and signed, it would have embodied the provisions of the deed which were applicable. Then, he was content to sign it without having the deed before him, and this was the same as if it had been indorsed. Assuming that Scott, Brothers, had already executed the deed, the consideration would be the execution by the plaintiff, and the advance of 1000*l*.

ALDERSON, B. I am of the same opinion. The agreement between the plaintiff and Scott, Brothers, was for the purpose of settling the accounts between them; and the defendant is only interested in the sixth and seventh articles, and his letter is equivalent to his writing opposite these articles, "I consent; and in consideration of these stipulations, I undertake as specified in the eighth article." The agreement is, therefore, proved as stated.

PLATT, B. The question is, whether the agreement that the judgment shall stand as security for 1000*l*. is proved. There is the memorandum which was in substance on the deed, and it is not necessary that the plaintiff should state more than has reference to the promise, and this memorandum expresses such parts of the deed as constitute the consideration for the judgment so remaining security. There was evidence for the jury that it was in the contemplation of the parties that the deed should be executed, and the verdict was right.

MARTIN, B. I am of the same opinion. The agreement by the defendant is not primarily to pay the debt of another, but it is an assent that a liability shall continue. It is not directly to pay the debt of Scott, Brothers, though indirectly it may have that effect.

Rule discharged.

 Brookes v. Tichborne.

BROOKES v. TICHBORNE.¹

December 16, 1850.

Evidence — Handwriting — Proof of, by Similarity of Spelling.

For the purpose of proving a document in which a word is spelt in a particular manner, *e. g.*, *Titchborne* for *Tichborne*, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence.

To an action of libel, the defendant pleaded a justification that the plaintiff had sent to the defendant a letter containing a libel on the defendant.

At the trial, before Patteson, J., at the Staffordshire Spring assizes, 1850, the defendant's counsel, for the purpose of proving that the plaintiff had sent to the defendant the libel mentioned in the plea, in an envelope on which the defendant's name was spelt *Titchborne* instead of *Tichborne*, proposed to show that the plaintiff had on other occasions spelt the defendant's name in a similar manner; and for that purpose, offered in evidence some letters, not in evidence in the cause, which he proposed to prove were in the plaintiff's handwriting, in which the defendant's name was so spelt by the plaintiff. This evidence was objected to by the plaintiff's counsel, and rejected by the learned judge. The plaintiff obtained a verdict, damages 1s.

Allen, Serj., having obtained a rule *nisi* for a new trial, on the ground of the improper rejection of this evidence, —

Keating and *Gray* showed cause.² The defendant was not entitled to prove that certain letters, unconnected with the subject of the action, were in the plaintiff's handwriting, and to put them in evidence for the purpose of proving, by the similarity of the spelling, that the envelope of the letter containing the libel alleged to have been sent by the plaintiff was in the handwriting of the plaintiff. This evidence stands on the same footing as evidence of the comparison of handwriting, and is open to the same objections. If, indeed, a party, by corresponding with the plaintiff, had acquired a knowledge that the plaintiff was in the habit of spelling the defendant's name with a "t," he might have been called as a witness to prove that fact. But *Hughes v. Rogers*, 8 Mee. & W. 123; s. c. 10 Law J. Rep. (n. s.) Exch. 238, shows that parties must not raise mere collateral issues as to the handwriting of documents. *Griffiths v. Ivory*, 11 Ad. & E. 322; s. c. 9 Law J. Rep. (n. s.) Q. B. 49, is also in point.

[*Parke*, B. There is no doubt about the relevancy of this evidence in the present case. What you contend is, that the fact can be

¹ 20 Law J. Rep. (n. s.) Exch. 69. 14 Jur. 1122.

² June 22, before PARKE, ALDERSON, and PLATT, BB.

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proved by general questions only, and not by specimens of handwriting.]

Yes. The mode proposed in the present case lets in all the inconvenience of comparison of handwriting. *Doe d. Perrey v. Newton*, 5 Ad. & E. 514; s. c. 6 Law J. Rep. (n. s.) K. B. 1. The case is very like that of the formation of particular letters of the alphabet. A witness is called to prove generally that, by correspondence with one of the parties to the suit, he knows that party to be in the habit of forming a certain letter in a particular manner, and that is the regular mode. But if that be the rule with regard to the formation of a letter, the same rule must be applied to the formation of a word, which is the present case.

[*Parke, B.* It seems to me that the proof of the fact itself is relevant; the only question is as to the proper mode of proof.]

Allen, Serj., in support of the rule. It is admitted that general evidence may be given of the habit of a party to spell a word in a particular manner, and the question is not as to the best mode of proof, but whether the present mode is admissible.

[*Alderson, B.* Suppose a witness had gone to the plaintiff and had shown him twenty letters, and the plaintiff had said they were all in his writing; and the witness on the trial had stated that in all these twenty letters "Titchborne" was spelt with a "t," the objection would, perhaps, be taken that that fact could not be proved without the production of the letters, inasmuch as the witness was speaking to the contents of written documents; but the answer would be, that the description of handwriting is not the contents of a document.]

Parke, B. The present case stands on the dividing line, and might be pushed to the length of causing the admission of comparison of handwriting. We will take time to consider our judgment.]

Chr. adv. vult.

PARKE, B., now delivered the judgment of the court. The question in this case, which was argued, before us, after Trinity term last, was, whether my brother Patteson was right in the rejection of evidence offered on the part of the defendant. It was an action for a libel charging the defendant with having written a libel on the plaintiff. The defendant pleaded a justification that the plaintiff had written and sent to the defendant a libel on him, the defendant. In the libel alleged to have been so written by the plaintiff, the defendant's name was spelt as with two "t's," "Titchborne," and not "Tichborne." In order to show that the plaintiff wrote that libel, the defendant's counsel proposed to show such was the mode in which the plaintiff spelt the defendant's name on other occasions, and for that purpose offered in evidence some letters which he proposed to prove to be written by the plaintiff, in which the name of the defendant was so spelt. The plaintiff's counsel objected to the admission of these papers; my brother Patteson rejected them, and on that ground the rule *nisi* for a new trial was granted. On showing cause, it was

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hardly disputed that, if the habit of the plaintiff so to spell the word was proved, it was not some evidence against the plaintiff to show that he wrote the libel; indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it; but it was objected, that the mode of proof of that habit was improper, and that the habit should be proved as the character of handwriting, not by producing one or more specimens and comparing them, by some witness who was acquainted with it from having seen the party write or corresponding with him. But we think this is not like the case of general style or character of handwriting; the object is not to show similarity of the form of the letters and mode of writing of a particular word, but to prove a peculiar mode of spelling words which might be evidenced by the plaintiff having orally spelt it in a different way or written it in that way once or oftener in any sort of character, the more frequently the greater the value of the evidence. For that purpose, one or more specimens written by him with that peculiar orthography would be admissible. We are of opinion, therefore, that this evidence ought to have been received, and not having been received, the rule for a new trial must be made absolute.

*Rule absolute.*¹

SLOCOMBE v. LYL.²

Hilary Term, January 18, 1851.

Pleading — Several Pleas — Trespass, quare clausum fregit — Reg. Gen. Hil. T., 4 Will. 4, s. 5, 6 — Not possessed — Liberum Tenementum.

The defendant to an action of trespass *quare clausum fregit*, may still plead together the pleas of not possessed and *liberum tenementum*, notwithstanding the former plea puts in issue the possession, and also the right to the possession of the close in question.

This was a rule calling on the plaintiff to show cause why the defendant should not be at liberty to plead to an action of trespass *quare clausum fregit* the two following pleas: first, that the said close was not the property of the plaintiff *modo et forma*; secondly, *liberum tenementum*.

This was an appeal from the decision of Martin, B., at chambers, who had refused to allow the defendant to plead to the whole of the first count a plea of denial of the plaintiff's possession and also a

¹ In *Jackson v. Phillips*, 9 Cowen, 94, a deed signed *Abraham Barnes* was offered in evidence. Barnes had been dead more than twenty years. His wife testified that he spelled his name *Abraham*, and wrote his surname with a small b. In the deed

² 20 Law J. Rep. (N. S.) Exch. 95.

it was written with a capital B. Specimens of his writing were then offered as additional evidence to prove that he spelt and wrote in the peculiar mode described, but the court held such evidence to be inadmissible.

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plea of *liberum tenementum*, but had desired the defendant to make his election.

Ogle showed cause. The learned judge was right. The case of *Jones v. Chapman*, 2 Exch. Rep. 803; s. c. 18 Law J. Rep. (N. S.) Exch. 456, overruling *Whittington v. Boxall*, 5 Q. B. Rep. 139; s. c. 12 Law J. Rep. (N. S.) Q. B. 318, decides that, to a declaration of trespass *quare clausum fregit*, the plea of not possessed puts in issue both the possession and the title. It follows, therefore, that since that decision the two pleas of not possessed and *liberum tenementum* ought not to be allowed. The plaintiff may retain the plea of not possessed, but ought not to be allowed to plead the other plea also.

[*Parke*, B. This court always held an opinion on this point contrary to that expressed by the court of queen's bench in *Whittington v. Boxall*; but still we always allowed these two pleas to be pleaded together.]

The pleading these two pleas together is in violation of the Reg. Gen. Hil. t. 4 Will. 4, s. 5.

[*Parke*, B. The plea of not possessed enables the defendant to dispute the plaintiff's possession; but *liberum tenementum* admits the possession, and drives the plaintiff to produce his title, if he has any.

Alderson, B. It has been the universal practice to allow these pleas to be pleaded together; and we cannot alter the practice without consulting all the judges.

Parke, B. In *Morse v. Apperley*, 6 Mee. & W. 145; s. c. 9 Law J. Rep. (N. S.) Exch. 61, these pleas were allowed to be pleaded together. I agree that the practice ought not to be altered without consulting the other judges.]

J. Brown, contra, was not called on.

POLLOCK, C. B. This rule, for allowing the two pleas to stand together, must be absolute. The one puts in issue the possession, the other the title. If the defendant were to join them in one plea, they would not be distinguished in costs, in case he were to fail in the one and succeed on the other.

PARKE, B. The plea of *liberum tenementum* may bring the issue to a single point; which is not the case with the plea of not possessed.

ALDERSON and *MARTIN*, BB., concurred.

Rule absolute.

The Stockton and Darlington Railway Company v. Fox.

THE STOCKTON AND DARLINGTON RAILWAY COMPANY v. FOX.¹

Hilary Term, January 29, 1851.

Practice — Notice of Trial after Injunction.

A town cause having been made a *remanet*, and then postponed by consent to the sittings after Hilary term, 1849, further proceedings were stayed by an injunction obtained by the defendant on the 11th of January, 1849. The injunction was dissolved on the 7th of August, 1850:—

Held, that the plaintiff was not bound to give a fresh notice of trial for the sittings after Michaelmas term.

THIS action had been brought on the 17th of April, 1848. Issue was joined and notice of trial given on the 3d of June, and the cause set down for the sittings in London after Trinity term. It was not reached in its turn, and was made a *remanet* to Michaelmas term, and appointed for the 22d of December. It was then postponed, by consent, to the sittings after Hilary term, 1849. The defendant then filed a bill for an injunction, and obtained the common order for want of answer on the 3d of January, 1849, which was extended on the 11th. The marshal thereupon indorsed on the record, "Stayed by injunction." The plaintiffs filed their answer on the 11th of April, 1849, and the injunction was dissolved on the 7th of August, 1850; but the order was not drawn up until the 9th of November. Notice of the order was then given to the marshal. On the 29th of November a letter was written by the plaintiff's attorney to the defendant's attorney, stating that the cause would be taken as a *remanet* at the sittings after Michaelmas term. It was admitted that this was not a good notice of trial if a notice was necessary. When the cause was reached, the counsel for the defendants objected to its being taken, and Pollock, C. B., ordered that it should be postponed until the sittings after Hilary term, 1851, on payment of costs by the defendant, provided the court should be of opinion that the plaintiffs were entitled to try without a fresh notice of trial; and a rule had been obtained calling upon the defendant to show cause why he should not pay these costs, against which

Sir F. Thesiger and *T. Jones* showed cause. The plaintiffs ought to have given a fresh notice of trial, just as if the trial had been put off by rule of court. *Jacks v. Mayer*, 8 Term Rep. 245, and *Chitty's Archb.* p. 590, 8th ed. A new notice is necessary where a cause is made a *remanet* at the assizes.

[*Pollock*, C. B. That is because the subsequent assizes constitute a different court; but in London and Middlesex it is the same court.] They cited also *Bosworth v. Philips*, 2 W. Black. 784.

Shee, Serj., and *J. Addison*, contra, were not called upon.

Per curiam.² No fresh notice was necessary; the defendant had himself stayed the proceedings, which the plaintiffs were at liberty to continue as soon as the injunction was removed.

Rule absolute.

¹ 20 Law J. Rep. (N. S.) Exch. 96.

² POLLOCK, PARKE, ALDERSON, and MARTIN, BB.

Elmes v. Ogle.

ELMES v. OGLE.¹

Hilary Term, January 15, 1851.

Joint-stock Company — Evidence — Notice to produce.

The secretary of a joint-stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased working.

Where secondary evidence of a document is *prima facie* receivable, the opposite party may interpose with proof of facts which, if true, would render it inadmissible.

In an action against one of the directors of a joint-stock company which had ceased working, for salary due to the plaintiff as its clerk, notice was given to the defendant to produce the minute book of its proceedings, kept by the secretary, which contained, as was said, entries of the occasions on which the defendant had attended the meetings of the company, and also the terms of the resolution under which the plaintiff had entered into its employ. The defendant having refused to produce this book:—

Held, first, that secondary evidence of its contents was *prima facie* admissible.

Secondly, that the defendant might interpose with proof to exclude it, by showing that the book was not in his power or control, and that he had communicated this fact to the plaintiff in sufficient time before the trial to enable him to apply for it elsewhere.

Thirdly, that the fact of the defendant's having paid the demands of another person against the company, for work done on the order of the secretary, was admissible evidence to show that he had authorized the work in respect of which the plaintiff sued.

ASSUMPSIT. The first count of the declaration alleged that the plaintiff had entered into the service of the defendant in the capacity of clerk for one whole year, from the 30th April, 1843, at the salary of 100*l.* a year, and that on the 1st February, 1844, the defendant wrongfully dismissed him from the service. There was also a count for wages and on an account stated. The defendant pleaded the general issue, with traverses of the plaintiff having entered and continued in the service, of his readiness to continue in it, and of the discharge from it. The case was tried before the lord chief baron in December last, when it appeared that the action was brought against the defendant, as one of the directors of "The British Hollands Distillery Company," to recover 80*l.*, the balance of salary as clerk of the company from the 30th April, 1843, to the 30th April, 1844. The company was formed about March, 1843, and a secretary appointed; but it died away in somewhat less than twelve months. The defendant was a member and director of the company during a considerable portion of that time, but it was a question whether he became such in March or May, and he had ceased to attend to its affairs for some time previous to its extinction. It was shown that a minute book of the proceedings of the company had been kept by the secretary, which contained, as was said, entries of the occasions on which the defendant had attended the meetings of the company, and also the terms of the resolution under which the plaintiff had entered into its employ. The defendant refusing to produce this book on notice, secondary evidence was offered of its contents, and on this being objected to,

¹ 15 Jur. 180.

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the lord chief baron held it receivable, unless the defendant showed that it was out of his power to produce the book, and had given notice of that fact to the plaintiff in sufficient time before the trial to enable him to apply for it elsewhere. The defendant's counsel then offered evidence to establish the former of these points, but the lord chief baron held it useless without the latter, and rejected the evidence; and secondary evidence of the book was accordingly given. A witness of the name of Smith was likewise examined on the part of the plaintiff, who proved that in the month of March, 1843, and several of the following months, he had done work for the company on the order of the secretary; and was paid by the defendant, on his threatening to sue him for it as director of the company. The jury having found for the plaintiff,—

Watson moved for a new trial. First, no proper foundation was laid for the reception of secondary evidence of the minute book. In order to render such evidence admissible, notice to produce the original document must be given to the party who has it in his possession, either actually or constructively, as when it is in the hands of his servant, banker, solicitor, &c. Now this book has been for the last seven years in the exclusive possession of the secretary to the company; and if the relation of master and servant ever did exist between him and the defendant, it has ceased during all that time. But it cannot fairly be said to have ever existed; for the secretary was appointed at the origin of the company, while the defendant, if director at all, became so at a subsequent period, and ceased to act as such before the company was extinct.

[*Parke, B.* The secretary has no possession of this book on his own account, but merely as servant of the directors, all of whom are presumed to have power over their servant; and that presumption is not rebutted by the fact of the concern having ceased working.]

Secondly, supposing the evidence offered receivable in the first instance, the defendant's proof that he had no control over the book ought not to have been rejected. *Harvey v. Mitchell*, 2 Moo. & R. 366. Thirdly, the evidence of Smith was improperly received. The hiring of the plaintiff by the company being supposed to be by a written document to which the defendant was party, his having paid a third person for work done for the company is altogether a collateral act. It would not be evidence in an action against a provisional committee-man of a railway company for goods supplied to the company.

[*Parke, B.* The becoming a provisional committee-man only intimates that the party is willing to act in the concerns of the company, and amounts to nothing unless he does act. The case of a director is different, for he takes on him the management of the company; and consequently, if you show that he has paid other demands on the company, it is some evidence that he has authorized the work in respect of which he is sued.]

In *Barden v. Keverberg*, 2 M. & W. 61, where a woman sued by a tradesman for goods sold and delivered to her as a *feme sole*, defended the action on the ground that she was *covert*, it was held that

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evidence of dealings by her with other tradesmen in which she held herself out as a *feme sole* was not admissible, unless her representation to them to that effect was made so as it might come to the knowledge of the plaintiff. He likewise moved on affidavits, that the secondary evidence which was given of the contents of the minute book was untrue in respect of the time when the defendant became director of the company.

PARKE, B. You may have your rule for a new trial on payment of costs; but on the other points I think my lord chief baron was right. With respect to the admission of the contents of the minute book, all that the law requires is that you shall not give secondary evidence unless you have made reasonable efforts to obtain the document itself. So soon therefore as the fact was made out that the defendant was liable to this demand as a person concerned in this company, i. e., that he had entered into this contract as one of its directors, notice to him to produce this book was sufficient; for as the case then stood, the defendant was presumably as much director as any one else; and although the concern had ceased, it must still be taken that all the books of the company were under his control. If indeed the defendant really could not cause the book to be produced, and had given notice of that fact to the plaintiff, the effort made by the plaintiff to obtain the original document would not then have been sufficient, and he should have taken further steps for that purpose by subpoenaing the secretary. But if nothing of the kind be said, notice to one of those presumably having control over the book is sufficient; and the lord chief baron was therefore right in holding that evidence that the defendant could not get possession of the book from the secretary was not receivable unless that fact was notified to the plaintiff either when the defendant was served with the notice to produce or within a reasonable time after. With respect to the remaining point, I have no doubt the evidence was admissible; the fact deposed to by Smith was evidence to go to the jury that the defendant was liable as one of the directors of the company.

ALDERSON, B. I think it clear that the evidence of Smith was material, in this way: The question was, if the defendant came into the concern in May, 1843, or before the 30th April in that year. Smith does work for the company beginning in March and ending a long time after; and the defendant's having paid for work done in March was some evidence that he came in in March and not in May. But independently of that, what was said by the court during the argument is sufficient to show that evidence receivable—the value of it is a different question. As to the other point, I quite agree that if there had been a distinct communication to the plaintiff that the book was in the hands of the secretary, and made in sufficient time before the trial to enable the plaintiff to get it from him, the plaintiff would not have done enough to let in secondary evidence of that book unless on that information he served the secretary with a *subpoena duces tecum*. But in the absence of that information from the defendant, it is only reason-

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able to suppose that it was in his power to produce a document which is in the hands of a man who was the servant of himself and others. We are here arguing on the assumption that the defendant was director of the company when the contract was made with the plaintiff; for if the secretary was not servant of the defendant and the other directors, the defendant would be entitled to the verdict on a totally different ground, namely, that he is not liable to the plaintiff at all. Still there ought to be a new trial on payment of costs, as the defendant had a right to suppose that the contents of the minute book would be represented truly.

POLLOCK, C. B. I agree with the rest of the court, and think it right to say so, because I consider questions on the law of evidence to be of extreme practical importance. In the case of *Sinclair v. Stevenson*, 1 Car. & P. 582, Best, C. J., thought that if you receive a notice to produce a document which should be in the possession of yourself or your agent, and are aware of an impediment which prevents you doing so, that by not giving notice of that impediment you acquiesce in the notice to produce.

The rule was accordingly refused on the points of law, and granted on the affidavits; which, after argument, was made absolute to reduce the damages to 50*l*.

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Hilary Term, January 23, 1851.

Bankruptcy — 12 & 13 Vict. c. 106 — Execution against Bankrupt.

A bankrupt, whose certificate of conformity is suspended for a given time, cannot be taken in execution after the expiration of that time, on a writ of execution issued during its continuance, under the provisions of the 257th section of the 12 & 13 Vict. c. 106.

Quære, whether execution under that section can be enforced against the property of the bankrupt.

THIS was a rule to discharge a bankrupt from execution, under the following circumstances: On the 4th July, 1850, the bankrupt obtained his certificate of conformity, with a suspension of its allowance for six months in consequence of some fraudulent conduct in parting with his property in order to give undue preference to a creditor, and a certificate for execution granted to his assignees. On that certificate a writ of execution was issued on the 11th December, by virtue of which the bankrupt was taken into custody *after the six months* limited for the suspension of his certificate *had expired*.

Bovill showed cause.² The question is, whether a bankrupt whose certificate has been suspended for a definite time can be taken in execution after that time has expired, on a writ issued during its

¹ 15 Jur. 156. 20 Law J. Rep. (N. S.) Exch. 125.

² JERVIS, C. J., MAULE, CRESSWELL, and WILLIAMS, JJ.

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continuance. This depends on the construction of several sections of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. By the 256th section it is enacted, that "if at the sitting appointed for the last examination of any bankrupt, or at any adjournment thereof, it shall appear to the court that the bankrupt has committed any of the offences hereinafter enumerated, the court shall refuse to grant the bankrupt any further protection from arrest; and if at any sitting or adjourned sitting for the allowance of the certificate of any bankrupt, it shall appear that he has committed any of such offences, the court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection." Among the offences enumerated, the fourth head is as follows: "If the bankrupt shall at any time within two months next preceding the issuing of the fiat or the filing of the petition for adjudication of bankruptcy, fraudulently, in contemplation of bankruptcy, and not under pressure from any of his creditors, with intent to diminish the sum to be divided among his creditors, or to give an undue preference to any of his creditors, have paid or satisfied any such creditor, wholly or in part, or have made away with, mortgaged, or charged any part of his property, of what kind soever." The next section then enacts, "that the assignees for the time being of the estate and effects of any bankrupt, when the accounts relating to his estate shall have become records of the court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt, immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the court, when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the court, in the form contained in schedule (B a) to this act annexed, and every such certificate shall have the effect of a judgment entered up in one of her majesty's superior courts of common law at Westminster until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such superior court shall be sufficient authority to him to issue and seal such writ, and it shall be lawful for such superior courts to make such orders and rules in that behalf as to them shall seem fit; provided always, that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance; provided also, that no execution by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt after the allow-

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ance of his certificate of conformity." And then by the 259th, "if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year, except by order of the court." Now the object of the execution granted by the 257th section is not to give to the assignees a judgment *simpliciter* — for they are made judgment creditors independent of that certificate altogether — but to punish the bankrupt for his past misconduct. All the acts enumerated in the 256th section for which a bankrupt's certificate may be suspended are criminal in their nature, and the words of the 257th section expressly are that the execution is to go "against the *body*" of the bankrupt. That section indeed says that the assignees or creditor to whom a certificate is awarded "shall be entitled to" issue and enforce "the writ of execution;" but the subsequent proviso only says that such execution shall not be *issued*; it does not say it shall not be *enforced*, after the allowance of his certificate of conformity. And this comes after the passage, which will probably be relied on by the other side, that the certificate for execution shall be deemed cancelled and discharged from the time of the allowance of the certificate of conformity; and which was probably inserted to prevent the property of the bankrupt from being taken under such an execution issued before allowance of the certificate. But all doubt is removed by the 259th section, which does not merely say affirmatively that the bankrupt shall not be kept in prison for more than a year without the order of the court, but contains an imperative enactment in the negative that "he shall not be discharged from such execution until he shall have been in prison for a year," &c.

Gray, in support of the rule. The language of the sections in question is so obscure, that in order to construe them the whole statute must be looked to; and the true key to their construction will be found in this, that the legislature in passing this act intended to assimilate the law of bankruptcy to that of insolvency. Now the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 76, enacts that the court may adjudge a prisoner to be discharged after he shall have been a certain time in custody, "to be computed from the making of the vesting order;" and by the 85th section, when a prisoner is adjudged to be discharged, &c., at some future period he shall be liable to be detained in prison, and to be arrested and charged in custody at the suit of any of his creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as if that act had not passed: "provided, nevertheless, that when such period shall have arrived such prisoner shall be entitled to the benefit and protection of this act, notwithstanding that he may have been out of actual custody during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time or any part thereof." It is true that the object of the execution against the bankrupt given by the 257th section of the present statute was to punish him for his

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misconduct; but the punishment contemplated was the *liability* to imprisonment, whether followed up by actual imprisonment or not: and that section in express terms renders all those penal provisions against the bankrupt inoperative from the moment of the allowance of his certificate of conformity. As to the argument respecting the property of the bankrupt, an uncertificated bankrupt can have none. Then as to the 259th section, the "taking in execution" there spoken of must be understood of a "lawful" taking in execution. The effect of a certificate in bankruptcy has always been understood to be the putting a man in a position to begin trade afresh; but according to the construction of the opposite side, a bankrupt whose certificate has been suspended for a number of years may be taken in execution at any time during their continuance, and when his affairs had got into a flourishing condition. To prevent this was the object of the 259th section, the true meaning of which is, that for however long a period a bankrupt's certificate may be suspended, he is not to be kept in prison for more than a year. [He was then stopped.]

POLLOCK, C. B. The rule to discharge this party out of custody must be made absolute. When the allowance of the certificate of conformity is complete, all proceedings against the bankrupt are at an end. And although the 259th section says that "if any bankrupt shall be taken in execution after the refusal of protection, or after the refusal or suspension of his certificate, he shall not be discharged until he shall have been in prison for one year, except by order of the court," &c., that provision does not apply to *every* case where a bankrupt is taken in execution after the refusal or suspension of his certificate; for at the end of the 257th section it is provided, that "no execution by virtue of any certificate which shall be granted to any creditor or assignees shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt after the allowance of his certificate of conformity." No doubt there is some obscurity in the statute, but I think that must be its meaning. It seems rather absurd to say that a writ shall not issue, but if it does issue it shall be executed.

PARKE, B. I have been satisfied by Mr. Gray that his view of this statute is correct, and that the provisions in question form part of the system previously established by the 1 & 2 Vict. c. 110, s. 85, which; while it entitles the debtor to the benefit and protection of the act at some future period, renders him in the mean time liable to arrest. Reading together the two sections on which this case depends, their meaning is clear, although the language in which they are expressed is somewhat obscure; but if each is to be construed literally, an absurdity would follow. Let us see, then, what was the manifest intention of the legislature in these two sections. First, then, it is clear that so soon as the commissioners have given the certificate of conformity, the assignees and creditors become judgment creditors. It is, in the second place, equally clear that by virtue of the certificate for execution, spoken of in the 257th section, the assignees or creditor

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to whom it is given may enforce execution against the *body* of the bankrupt, (whether they can against his *goods*, is a point of some obscurity, which we need not decide.) But then that section contains a provision that every such certificate shall be discharged by allowance of the certificate of conformity from the time of such allowance.

Now in the present case that allowance was granted constructively on the 4th of January, 1851, though pronounced six months before, and the obvious intention of the legislature was that no execution issued should have any effect or operation after that time; so that the case becomes analogous to a writ founded on a judgment, where, if the judgment is defeated by an *audita querela*, you cannot afterwards enforce execution. Then is there any difficulty created by the wording of the next clause, which provides that no execution by virtue of any certificate for execution "shall be *issued*," it does not say "*issued or enforced*," after allowance of the certificate of conformity? But if allowance of that certificate is an absolute destruction of the certificate for execution, we ought to read this part of the section as if the legislature had said "no execution shall be issued or enforced after allowance of the certificate of conformity." That is the meaning of the 257th section. Then with respect to the 259th, if we were to put the construction on it which is contended for in this case, and hold that a bankrupt whenever taken in execution must undergo a year's imprisonment, it would be extremely hard. Suppose his conduct deserved a less punishment; suppose the judgment of the commissioner were that he be discharged from all liability at the end of three months, and the assignees or creditor were to take him in execution before the expiration of that time, it would be strange if he must in such a case lie in prison for a year; while only a like consequence would follow if the certificate were suspended for three or four years. It appears to me, therefore, that, on a reasonable construction of the 259th section, we must hold that when a certificate of conformity is altogether refused, the bankrupt may be taken and detained in custody for a year, leaving it in the power of the court of bankruptcy to discharge him from it if they see fit. So likewise, if the certificate is suspended, though it may be for a year or more, still the bankrupt is to be kept in custody for one year only. We must qualify the 259th section in that way; and the result in the present case will therefore be, that as the period of time during which the certificate of conformity was to be inoperative expired on the 4th January, 1851, the bankrupt could not be taken in execution after that day.

ALDERSON, B. I am of the same opinion. I do not however deem it necessary to alter the words of the 257th section at all, and think they may well be construed together. According to the earlier sections of this statute, the bankrupt's certificate of conformity may either be granted, or altogether refused, or suspended for a limited time. Then the form of the certificate for execution in either of the two latter events is given in the schedule (B a) to the act, and is merely that the assignees or creditor are to be entitled to a writ of execution against the bankrupt, that the court refuses him any further protection for

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his person; but it does not say for how long the certificate of conformity is suspended, or whether it is refused altogether. The assignees or creditor might therefore at any time obtain a writ of execution on production of that certificate, for the officer who is to grant the writ cannot know whether they are really entitled to it or not. The 257th section further provides that when allowance of the certificate of conformity has taken place, i. e., when the period of time shall have elapsed during which it is to be suspended, the certificate thus given in the form (B a) shall be cancelled; just, as my brother Parke has observed, in the same way as when a judgment is put an end to by an *audita querela*, the natural consequence of which is that every thing founded on the judgment must fall with it. Why then, it may be asked, did the legislature put into this section the subsequent words, "no execution by virtue of any certificate which shall be granted to any creditor or assignees as aforesaid shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt after the allowance of his certificate of conformity," if according to the previous part of the section such execution can neither be issued nor enforced, these latter words are utterly useless, for they are implied in the words that "the certificate shall have been deemed to have been cancelled and discharged by the allowance of the certificate of conformity"? But taking the whole section together, those words may possibly have this effect, that such execution, if granted after the allowance of the certificate of conformity, shall be an *irregular* execution, and as such liable to be set aside with costs as irregularly issued, independent of the right of the party to be discharged out of custody. In the present case indeed that point does not arise, as the execution has been regularly issued, the complaint being that it was irregularly enforced. The only rational construction of the 259th section, and the only one which will render it consistent with the 257th, is, that when the certificate of conformity has been suspended for a longer period than a year, and the bankrupt is taken in execution, he cannot be let out of custody until he has been in prison for a year, unless before the expiration of that year the period for suspension expires, in which case his imprisonment must end at the moment when the certificate for execution is cancelled or discharged.

PLATT, B. Mr. Gray has taken a correct view of the law by connecting the provisions of the present Bankrupt Act with those of the Insolvent Debtors' Act, 1 & 2 Vict. c. 110; for clearly, in my judgment, the legislature had in view precisely the same object as in that statute, namely, to punish the bankrupt, although entitled to his certificate of conformity, by making him either a fugitive or a prisoner for a certain time. The legislature says that the court of bankruptcy, when it shall have suspended its certificate of conformity, shall grant a certificate to the assignees or creditor, and that such certificate shall have the effect of a judgment in the superior courts until the allowance of the certificate of conformity; and it is to have the effect of a judgment during that time only; for the section goes on to say that every

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certificate for execution is to be cancelled or discharged absolutely by the allowance of the certificate of conformity. In the present case, therefore, the former certificate is gone altogether; and why is the man to be kept in execution on that which is bad and gone? Then it is said, how do you construe the words at the end of that section? It seems to me that my brother Alderson has put that matter on its right footing; for the officer whose duty it is to act on this certificate for execution would know nothing about the time for which the certificate of conformity was suspended, and parties might come to the court for the writ after that time had expired. As to the argument drawn from the 259th section, that also has been properly answered by Mr. Gray, that the effect of that section is to limit to one year an imprisonment which otherwise might extend to ten as well as one.

PARKE, B. I do not disagree with the construction put on the latter part of the 257th section by my brother Alderson; but it is unnecessary to decide the point.

Rule absolute, without costs; no action to be brought.

THE KILKENNY RAILWAY COMPANY v. FIELDEN.¹

Hilary Term, January 28, 1851.

*Railway Company — 8 Vict. c. 16, s. 36 — Foreign Corporation —
Security for Costs — Appeal from Judge at Chambers.*

In an action brought in this court by a company incorporated for making a railroad in Ireland, the court compelled the plaintiffs to give security for costs, although it was sworn that the company had no property in Ireland, and that the greatest part of the shareholders were permanently resident in England.

The rule respecting appeals from a judge at chambers is, that the court will entertain them in cases where the judge is merely acting as delegate of the court to transact its business: *aliter*, where he is exercising an independent jurisdiction conferred on him by the statute.

Quære, whether the provisions of the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16, whereby shareholders in a joint-stock company are rendered liable for its debts, apply to cases where the company is plaintiff.

J. A. RUSSELL had obtained a rule calling on the plaintiffs, "The Kilkenny and Great Southern and Western Railway Company," to show cause why they should not find security for the defendant's costs. The company in question was formed for the purpose of making a railroad in Ireland; and was incorporated by stat. 9 & 10 Vict. c. 360, which also embodied the Companies Clauses Consolidation Act, 8 Vict. c. 16. It was stated by affidavit that the company had no property in Ireland, and that a large majority of the shareholders

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were permanently resident in England. Platt, B., on application made to him at chambers, refused to interfere.

Watson and *Willes*, who appeared to show cause, took a preliminary objection to the jurisdiction of the court; contending that the decision of a judge at chambers, in a matter where he has jurisdiction, on facts regularly brought before him, is final, and cannot be questioned; for which they cited *Tudman v. Wood*, 4 Ad. & El. 1011, and *Lane v. Newnan*, 1 Bail C. C. 93.

[*Parke*, B. This matter has been several times before the courts, and the principle on which they proceed is, that the court will always review the decision of a judge where he is acting merely as its deputy, but not where an entirely independent jurisdiction is given to him by statute.

Pollock, C. B. If any distinct rule exist on the subject, it is that stated by my brother *Parke*; and the case of *Gibbons v. Spalding*, 11 M. & W. 173; 7 Jur. 377, seems to that effect. Wherever a judge at chambers exercises a jurisdiction inherent in him merely as a judge, the court will not interfere with his decision; but it is different where he is sitting for the court to transact that business of practice which, if there was time for it, would be done by the court itself.

Alderson, B. The case of *Pike v. Davis*, 6 M. & W. 546; 4 Jur. 395, is a distinct authority against the objection.]

Watson and *Willes* then showed cause on the facts. It is true that when a foreign corporation sues in the courts here, the defendant is entitled to security for his costs, and it makes no difference that a large number of its members or much of its property is in this country. *The Limerick and Waterford Railway Company v. Fraser*, 4 Bing. 394. But the plaintiff company in the present case cannot be treated as a foreign corporation *simpliciter*, being composed chiefly of shareholders resident in England, and having no property of its own elsewhere; and it is a rule of practice that security for costs cannot be exacted if any one plaintiff live within reach of the process of the court. *M'Connell v. Johnson*, 1 East, 431. *Orr v. Bowles*, 1 Hodg. 23. *Anon.*, 2 Cr. & J. 88. But a stronger reason for the court refusing this application is that the defendant, if successful, may recover his costs from the shareholders by the means pointed out in the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 36, which enacts that "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the

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amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee." They referred to *Devereux v. The Kilkenny Railway Company*, 1 Prac. Rep. 788; 14 Jur. 1028. *Hichins v. Same*, 1 Prac. Rep. 712.

J. A. Russell, in support of the rule. *The Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573; 3 Jur. 35, is an express authority that, according to the general rule of practice, the defendant in a case like the present is entitled to security for his costs; and the only question is, whether that right is divested by the operation of the 36th section of the Companies Clauses Consolidation Act. Now it is not clear that a *defendant's* costs can be recovered under that section, for its language, as well as the preamble by which it is introduced, seem to point only to cases where the railway company is the party sued. And even on the opposite construction the defendant would be hampered by many difficulties before he could get his costs; for he must satisfy the court that the company has no available property, and that the persons whom he seeks to make liable are shareholders in it. The court ought not to deprive a party of a clear and certain remedy on the chance of his having an uncertain and troublesome one under a doubtful act of Parliament. He was then stopped.

POLLOCK, C. B. We are all of opinion that this rule must be made absolute. It is desirable that the rules of practice should be simple and clear; although in the various questions which arise out of the fluctuating transactions of life and changes made in certain branches of the law it frequently becomes exceedingly difficult to preserve that simplicity which is so desirable. But on the subject now before us we have one clear plain rule—if a foreign partnership, foreign individual, or foreign corporation, purposes to prosecute a suit here, such body or such individual may be called on to give security for the defendant's costs. To this rule there is only one exception, which is when the plaintiff has *real* property in this country—his having personal property is not enough. Then, is the body instituting this suit and called "The Kilkenny and Great Southern and Western Railway Company" to be considered for this purpose as a foreign corporation? It is proposed to answer the application by saying that there are shareholders in the company who live in England, and would be liable if the company did not pay the defendant's costs. But it is by no means certain in what way they might be made liable. It is a matter of doubt, whether there being, as is said, no effects of the company in Ireland, the shareholders might be proceeded against at once, or whether it would be necessary to sue the company in Ireland to ascertain that there are no effects there. The very circumstance of the defendant's power to recover his costs depending on the construction of this recent act of Parliament is enough, in my judgment, to induce us to say that the practice of the court is so and so; and if you desire to introduce an exception to the

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rule, you must make it out clearly, or the ordinary practice will prevail. Even on the construction of the statute, my own impression is adverse to the plaintiff's argument, for I think you could not proceed against the shareholders in England without first endeavoring to make the judgment available in Ireland, and to do that you must bring an action. The best answer to the present application seems this, Why do you want security for costs? It is that you may sue the sureties if necessary, and here you have sureties already in the shareholders. That argument, however, is specious, but not sound; for when you proceed against the persons who have become security for your costs, the parties are before you, you prove the amount of costs incurred, and put in the instrument by which they have become surety, and this done, you have no more trouble; whereas if you are to consider shareholders in the light of sureties already given, as against them you must prove that they are shareholders, in which there might be some difficulty; for the register is only *prima facie* evidence of that fact, and it is always open to the party who is sought to be charged as a shareholder to show some fraud or mistake in the return, and that he is not such in reality. It therefore appears to me far better to adhere to the simple rule; and at all events lay down this, that if it is proposed to ingraft an exception on it, that exception must be one free from doubt.

PARKE, B. I am of the same opinion. We must begin by considering this body as an Irish corporation, and on the footing of a *person* resident in Ireland; and have the authority of the court of common pleas, in *The Limerick Railway Company v. Fraser*, for so dealing with an Irish company. The question, therefore, comes to this, Can we refuse to compel an Irish plaintiff to give security for costs according to the practice of the court, because there is a possibility that the defendant may be entitled to sue some shareholders in England for them? The cases establish that, in order to prevent the rule relative to security for costs from applying, it is not enough to show that at the time of the application for that security the plaintiff has *personal* property in this country sufficient to satisfy a claim for costs; because such property is of a fluctuating nature, and might not be available when the defendant's judgment is obtained. That is the established rule; on the footing of which Mr. Justice Patteson decided the case of *The Edinburgh Railway Company v. Dawson*, where he held that the circumstance of a foreign company having money and exchequer bills in England was no answer to an application like the present, although the stat. 1 & 2 Vict. c. 110, s. 12, gives a remedy against that kind of property; because, he says, the only exception to the rule is where the party has real estate, which being of a permanent nature is presumed to remain in England. The only question therefore is, whether the contingent remedy given by the Companies Clauses Consolidation Act, i. e., the contingent remedy against some of the shareholders in a company like the present, is to be considered equivalent to real estate within the meaning of this rule. I think it cannot. There would be a difficulty

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in enforcing the remedy; for an application to the court would be necessary for leave to put it in force, and the party would be bound to show that he had taken due pains to obtain execution against the property of the company before the court would grant him the statutory remedy. That was the decision of this court in *Devereux v. The Kilkenny Railway Company*. I think, therefore, we are to treat this company as an Irish individual, and that the fact of some of its shareholders being resident here amounts to nothing, and certainly forms no sufficient reason to take the case out of the ordinary rule.

ALDERSON, B. It seems to me that matters like the present, which in truth arise out of the discretion exercised by the courts, must be acted on and dealt with according to reason. The rule of practice is founded on this, that as the plaintiff abroad cannot be reached by the direct process of the court, the defendant has a right to be indemnified against the costs he may incur by being improperly sued by him. We ought always, in applying this principle, to approach as near as we can to fixing the party by the direct process of the court. We can do so effectually where one of several partners suing is in England, though the others are abroad, for that one may be reached and taken in execution, so that there is a personal responsibility to the defendant. When all the plaintiffs reside abroad, there is none: but you bring the case as near as possible to it by compelling them to find some one here to give security for the defendant's costs. Now the case before us is that of a foreign corporation suing here, but then it is said there are certain persons resident in England who may by a certain process be rendered responsible to the defendant. That process is, however, extremely complicated and doubtful, and might require two suits before it could be made available; and it would therefore be a very unreasonable exercise of the discretion of the court, were we to deprive the defendant of the remedy which he would otherwise have against the parties who made themselves responsible to him, and substitute for it something extremely inconvenient and doubtful.

PLATT, B. Although I refused this application at chambers, I was very desirous it should come before the court, for the question is one of some importance. I am now satisfied that I was wrong in refusing to make the order for security for costs. My lord chief baron has put the matter on its true ground, namely, that the rules of practice should be clear, so that those who conduct the business of the courts may know what they ought to do in questions which arise. Now here a foreign company has brought an action, and if it appeared that in the event of judgment against that company the defendant would have an easy remedy for his costs, there would be no pretence for coming for this rule. But so far from that being the case, so far from the course suggested being an easy one, it is of a complicated character. When a party proceeds by *sci. fa.*, no one can tell the result; for, though a continuance of the original suit, it has all the contingencies of a suit itself, besides the contingency of his being allowed to

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have it at all; for he must first satisfy the court that he is entitled to it, and then may be called on to prove the whole case by issues raised by his adversary.

ALDERSON, B. As the shareholders are only responsible to a limited extent, i. e., to the extent of their shares, the defendant might be obliged to bring half a dozen actions to reimburse himself.

Rule absolute.

COURTIVRON & another v. MEUNIER.¹

Hilary Term, January 23, 1851.

Bankruptcy — Concealment of Property — Certificate.

The certificate of a bankrupt who has concealed any part of his property with intent to defraud his creditors is void by the 38th section of the 5 & 6 Vict. c. 122, even though he voluntarily gives it up before the granting of the certificate.

THIS was an action on some negotiable securities; to which the defence was, that the defendant had obtained his certificate as a bankrupt under the 5 & 6 Vict. c. 122.² At the trial before the lord chief

¹ 20 Law J. Rep. (N. S.) Exch. 104. 15 Jur. 275.

² The three sections on which this case turns are as follow: and although the 5 & 6 Vict. c. 122, is almost wholly repealed by the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, they are re-enacted respectively by its 201st, 251st, and 106th sections.

5 & 6 Vict. c. 122, s. 38. "No bankrupt shall be entitled to the certificate, under this act, and any such certificate, if obtained, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day 20*l.*, or within one year next preceding his bankruptcy 200*l.*, or if he shall within one year next preceding his bankruptcy have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made or been privy to the making any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or shall have concealed any part of his property," &c.

Sect. 32. "If any person adjudged bankrupt after the commencement of this act shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing to be left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the *fiat*, and of the sittings of the court authorized to act in the prosecution of the *fiat* against him, surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time upon oath; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bona fide* before sold or disposed of in

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baron it appeared that the defendant had, subsequent to his bankruptcy, sent away some goods from his house, with the view of concealing them from his creditors; but after his examination before the commissioner, becoming apprehensive of being betrayed by some dismissed servants, he prayed to be allowed to make an addition to his examination, and disclosed the circumstance. The goods were accordingly taken possession of by the messenger, and the bankrupt obtained his certificate. The plaintiff's counsel contended that this conduct of the bankrupt amounted to a concealment of property within the meaning of the 38th section of the 5 & 6 Vict. c. 122, and that the certificate was consequently void; but the lord chief baron, reserving leave to move to enter a verdict on the point, directed the jury that there could be no concealment within that section unless persevered in to the close of the final examination, the law allowing the bankrupt a *locus penitentiae* till that time. The jury having found a verdict for the defendant, —

Humfrey, in Michaelmas term, obtained a rule accordingly.

Rew showed cause. In order to deprive a bankrupt of the benefit of his certificate, there must have been an actual concealment by him of his property up to his final examination — an abortive attempt to conceal, or a concealment repented of before that time, is insufficient. According to the argument of the other side, a bankrupt who concealed any portion of his property for a single instant would lose the benefit of his certificate, which would be not only unjust, but at variance with the policy of the bankrupt laws in encouraging a full disclosure.

[*Parke*, B. Would the bankrupt in a case like the present be indictable under the 32d section?]

The concealment spoken of in that section is a different thing, for that must be with intent to defraud creditors.

[*Parke*, B. Must not the concealment spoken of in the 30th section be understood to mean a fraudulent one? There might be a concealment of property to avoid thieves or burglars.]

The mere fact of concealment from creditors or others entitled to discovery is nothing without an intent to defraud; for the effect of a

the way of his trade, or laid out in the ordinary expense of his family; or if any such bankrupt shall not upon such examination deliver up to the said court all such part of such estate, and all books, papers, and writings relating thereunto, as shall be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children;) or if any such bankrupt shall remove, conceal, or embezzle any part of such estate to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable," &c.

Sect. 30. "In all cases where it shall be made to appear to the satisfaction of the court authorized to act in the prosecution of any *flat* in bankruptcy, that there is reason to suspect and believe that property of any bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such court is hereby directed and authorized to grant a search warrant to any person appointed by the court in which the adjudication against such bankrupt shall have been made, and it shall be lawful for such person to execute such warrant according to the tenor thereof," &c.

temporary concealment might be to increase the value of the property, and consequently the amount of the dividend.

[*Parke, B.* In *Rex v. Walters*, 5 Car. & P. 138, Mr. Justice J. A. Park expressed an opinion that a bankrupt who conceals his property has a *locus pœnitentiæ* till his last examination. How do you reconcile that with the provision that he shall be indictable if he remove his goods? The 32d section makes the not delivering up his property on final examination an indictable offence, as also the removing any part of it, or the concealing any part of it.]

Removal means putting his property away altogether, not merely transferring it from one place to another.

[*Alderson, B.* Suppose the bankrupt were after his bankruptcy to conceal his books for a time and afterwards bring them back, or alter, but put them right again before the final examination, has he a *locus pœnitentiæ* there also?]

No; but those acts are very different from concealment. If the court think the question turns on the intention with which the bankrupt sent away these goods, there ought to be a new trial, as that question was not left to the jury.

[*Platt, B.* You should have asked the judge to put it to them.]

The decisions on the Bankrupt Act are in favor of the defendant. *Ex parte Bryant*, 1 Gl. & Ja. 205, was a petition to stay a bankrupt's certificate, on the ground that he had secreted some of his effects, which were however disclosed to the commissioner before the last examination, who, notwithstanding, granted the certificate. The vice chancellor refused the application, and after referring to the words of the stat. 5 Geo. 2, c. 30, that where a certificate is set up as a bar to an action it shall be avoided by proof that it was obtained unfairly and by fraud, or by proof of concealment to the value of 20*l.*, says, "This necessarily refers to a concealment at the time of signing the certificate. Here the fraudulent attempt of the bankrupt to conceal his property had been detected and exposed, and the commissioner thought fit to sign the certificate with a full knowledge of the facts."

[*Pollock, C. B.* There can be no doubt the vice chancellor was right in his decision in that case, but his language on which you rely is extrajudicial.]

Rex v. Evans, 1 Moo. C. C. 70, is an authority that a bankrupt was not indictable under the stats. 5 Geo. 2, c. 30, and 1 Geo. 4, c. 115, for concealing his effects, if he restored them previous to his final examination.

[*Pollock, C. B.* The decision of the judge in that case only proceeded on the ground that the whole transaction was not brought fairly before the jury, the prosecutor not having produced the account book of which the prisoner spoke at his final examination.]

Humfrey and *C. Pollock*, who appeared to support the rule, were stopped by the court.

POLLOCK, C. B. I entertain no doubt that this rule ought to be made absolute. At the trial the only defence set up to the action

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was, that the defendant had obtained his certificate as a bankrupt; in answer to which the plaintiff undertook to show that the defendant, when bankrupt, had concealed some of his goods; and certainly on a review of all the authorities, and having all the light we can obtain from the learning of those who have preceded us, we must come to the conclusion that the conduct of the defendant did amount to a "concealment" within the 38th section of this statute. That section ought, I think, to be construed with reference to the 32d; where we must read the word "conceal" in connection with the words "remove or embezzle;" and construe it to mean the doing some act which, if not afterwards undone, would leave the goods concealed; and the question is, whether the transaction disclosed by the evidence in this case was such a concealment. No doubt, in order to have this character, the act must be done with intent to defraud creditors; and there can be no question that such was the case here. I certainly was under the impression at the trial that the bankrupt had a *locus penitentiae* till the close of his final examination; and although the cases of *Rex v. Evans* and *Ex parte Bryant* which have been cited in support of that position are clearly distinguishable, yet the language of Mr. Justice J. A. Park in *Rex v. Walters* must, perhaps, be considered as an authority in favor of Mr. Rew. On examination of the subject, however, it appears to me that that language cannot be supported by law, and that the true construction of the 38th section is this, that if a bankrupt has concealed goods so as to offend against the 32d section, his certificate will be void under the 38th. I reserved the point, however, deeming it sufficiently doubtful to deserve consideration. It has now been considered as well as very elaborately argued, and every attention has been bestowed upon it. Mr. Rew has industriously collected the cases; but the result is that I ought to have told the jury that no such *locus penitentiae* existed; and if I had, they would have found for the plaintiff.

PARKE, B. I am of the same opinion. By the 38th section of this statute the bankrupt is not entitled to the benefit of his certificate, if, *inter alia*, he has, after bankruptcy, concealed any part of his property. It is clear that, in order to answer the description of a concealment within this section, the act must be done by the bankrupt with the intention of defrauding his creditors; but it is equally clear that if the case falls within any of those which would be punishable as felony under the 32d section, the certificate would be void. We need not decide if the term "concealment" would be satisfied by an omitting to give a full account of his estate before the commissioner; for the 32d section makes it clearly a distinct offence, if before the last examination the bankrupt "shall remove, conceal, or embezzle any part of his estate to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors." It therefore seems to me that under that section the bankrupt is punishable as a felon if with intent to defraud, and before his final examination, he puts his goods into a secret place with that intent; and has after that no *locus penitentiae*. It is quite a different offence

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under the 32d section from the omitting to make full discovery on his final examination. On the question, therefore, whether the act proved against the bankrupt in this case to have been done by him after his bankruptcy is a concealment of effects within the 32d section, I think it clearly is, as my lord chief baron has already shown. There is no hardship in the case: for if a man seeks to take the benefit of an adjudication in bankruptcy which protects him from his debts, he must not commit such a fraud as the sending goods to a secret place in order to prevent his creditors from getting them; the doing which is an offence against the statute, and would not be purged even by a disclosure on final examination.

ALDERSON, B. If the courts had referred to the words "remove and embezzle" which in these statutes accompany "conceal," the idea of a *locus penitentiae* in cases like the present would not have arisen; for though you can *continue* to *conceal* property, it is difficult to see how you can continue to remove or embezzle it.

PLATT, B., concurred.

Rule absolute.

THE ATTORNEY GENERAL V. NAPIER.¹

February 15, 1851.

Legacy Duty — Property administered abroad.

An officer in the queen's army, serving in India, died there intestate, leaving all his property (except a small sum owing to him from the war office) locally situate in India. The widow took out letters of administration in India, and after paying the debts, &c., invested the residue of the estate in India in her own name, for the benefit of herself and the next of kin. Eighteen months afterwards, she came to England and took out administration, in order to recover the debt from the war office:—

Held, that she must account for, and pay legacy duty on, the whole of the property in India.

THIS case was argued by consent before Parke and Alderson, BB., on a rule obtained by *Crompton*, on behalf of the crown, calling on the defendant, as administratrix of John Napier, deceased, to account for and pay the duties on the whole of his personal estate. John Napier was a captain in her majesty's 62d regiment of foot, serving in the East Indies: he died there intestate, leaving the whole of his property, except the sum of 92*l.*, presently mentioned, actually situate there. His widow was also resident there, and she took out letters of administration in the Ecclesiastical Court of Bombay. Under those letters of administration she collected the whole of the estate, and she paid the debts and funeral and testamentary expenses, and invested the clear residue in her own name for the benefit of herself as widow and her child as sole next of kin of the intestate. The administratrix continued to reside in India for a year and a half

¹ 15 Jur. 253. *Ex relatione.*

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afterwards, and then returned to England. A sum of 92*l*. was due to the intestate from the war-office, and the widow took out administration in England for the sole purpose of obtaining that sum. The stamp-office claimed the usual account of the whole of the estate. The administratrix accounted for the portion in England, and offered to pay the duty. The only question was as to the remainder of the property, the stamp-office claiming the duty on the whole of the property in India.

Alcock, for the administratrix, showed cause. The administration in England had no reference to any other portion of the property than the 92*l*.

[*Parke*, B. It is immaterial where she took out administration. The question is, where the intestate was domiciled at the time of his death. I suppose that must now be considered as settled since the case of *Thomson v. The Advocate General*, 12 Cl. & Fin. 1; 9 Jur. 217.]

Crompton, for the crown. He was not in the service of the East India Company.

[*Parke*, B. No; that makes the difference.]

This estate, being the estate of a person dying in India, which was situated in that country, administered there, and completely appropriated in India by the administratrix, and brought to this country by her, not as administratrix, but as the person beneficially entitled, is not liable to legacy duty.

[*Parke*, B. Was not the rule finally settled in *Thomson v. The Advocate General*, which was twice argued?]

There is a case precisely similar to this.

[*Parke*, B. Then it must have been one of the cases before *Thomson v. The Advocate General*.]

The first case is *Logan v. Fairlie*, 2 Sim. & S. 284; 1 My. & C. 59.

[*Parke*, B. All those cases are overruled surely.]

I do not believe one of them is overruled. It was not decided, in *Thomson v. The Advocate General*, that the question of domicile was to be the rule in all cases.

[*Parke*, B. I think nothing was more settled than that point.]

This case is governed by *Jackson v. Forbes*, or *The Attorney General v. Jackson*, 2 Tyr. 354; 2 Cr. & J. 382; 8 Bligh, 15; 2 Cl. & Fin. 48; 3 Tyr. 982, which was approved of in the case of *Thomson v. The Advocate General*, and was spoken of in terms of the highest approbation by Lord Cottenham: that case is on all-fours with this.

[*Parke*, B. You do not contend that in this case an officer in her majesty's service, going to the East Indies in his character of officer, acquires a domicile there?]

It has been decided that a queen's officer cannot acquire a domicile in India for the distribution of an estate, but it does not follow that the same domicile applies for the payment of legacy duty.

[*Alderson*, B. Yes; *Thomson v. The Advocate General* lays down the rule distinctly, that if the domicile was in England, the accounting

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is to take place in England as to property even in Russia or Austria, or any other country, provided it be personal property.]

Yes; but the case of *Thomson v. The Advocate General* is merely the converse of the case of *Re Ewin*, 1 Cr. & J. 151.

[*Parke, B.* This is the converse of *Thomson v. The Advocate General*. In *Re Ewin* there was a domicil in England, and property abroad.]

Jackson v. Forbes was approved of in *Thomson v. The Advocate General*. It was the case of an officer in the queen's service, who was at the time of his death possessed of real and personal estate situate in the East Indies. His executors were resident there, proved the will there, and remitted home the estate; and it was held that legacy duty was not payable.

[*Parke, B.* The case of *Jackson v. Forbes* came before the Court of Exchequer, but before they had got the correct rule.]

But the House of Lords does not overrule it in *Thomson v. The Advocate General*. In the case of *Jackson v. Forbes* there was no dispute as to the domicil; it was known that the testator was a queen's officer. It is stated in the argument, "There is here no dispute about an Indian domicil, or an English domicil acquired by a residence in India. *Munroe v. Douglas*, 5 Mad. 379, shows that a Scotchman may acquire a domicil by a local residence in the East India Company's service, so as to make the English law of distributions prevail over the Scotch law; but that is because India is subject to English law. In this case there can be no Indian domicil, but the *domicilium originis* only." The note to the report says, "The testator was in the king's service." This shows that the fact of British domicil was clearly brought to the notice of the court. *Thomson v. The Advocate General* shows that Lord Lyndhurst considered that the domicil was raised in all these cases, but that other circumstances took them out of that rule of domicil. The case of *Jackson v. Forbes* is on all-fours with the present. It was again argued in the House of Lords by the solicitor general, on the part of the crown. The crown pressed it on the ground of administration, that the estate had been administered in England, and therefore duty was payable. The lord chancellor recommended the House to affirm the decision of the Court of Exchequer, which was done. There the domicil was clearly British, and this court will not overrule the decision of the House of Lords. The only difference between the cases is, that in that case all the property was in India, and in this a portion was in England. *Arnold v. Arnold*, 2 My. & C. 256, followed *The Attorney General v. Jackson*.

[*Alderson, B.* Lord Cottenham, C., says, "When the act speaks of 'any will of any person,' and of the legacies being payable out of the personal estate, it must, I think, be considered as speaking of persons and wills and personal estates in this country."]

Yes; here neither one nor the other is in this country.

[*Alderson, B.* Then you must add to that the number of opinions delivered by noble lords in the House of Lords, showing that the personal estate is always where a person is domiciled in point of law. If a man is domiciled in this country the estate is in this country, in point of law, though in fact it is a debt due from a person in India.

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Take the two cases together, the *dicta* together, that seems to be the decision at which the House of Lords arrived; and what Lord Campbell says is, "The truth is, my lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought much of it; but it is a very convenient doctrine; it is now well understood, and I think that it solves the difficulty with which this case is surrounded."

In the same case Lord Lyndhurst says, "The doctrine of domicile has been well understood from the first."

[Parke, B. Unluckily, we have not got, in *Jackson v. Forbes*, the reasons of the court. I have always understood, since that last case in the House of Lords, that domicile was the rule.]

It may be so where the other facts and circumstances do not take it out of the rule, as Lord Lyndhurst stated in *Thomson v. The Advocate General*. Here the death abroad, the administration abroad, the appropriation abroad, every thing taking place abroad, are sufficient to take it out of the rule of domicile.

[Parke, B. In *Jackson v. Forbes*, where did the court assume the domicile to be?

Crompton. In the one set of reports domicile was not mentioned.]

It is stated that he was a queen's officer in both, and in that case, and in the other case of *Arnold v. Arnold*, it was expressly said, by the solicitor general, that the crown did not put it on the question of domicile.

[Parke, B. They assumed that he had a foreign domicile.]

No; they knew he had an English domicile, according to Lord Brougham's judgment in the House of Lords.

[Parke, B. In Mr. Justice Williams's book he considers that, in *Jackson v. Forbes*, the testator having been born in Scotland, and having resided and died in India, therefore the domicile was in India.]

That could not be so, for he was a king's officer.

[Parke, B. That is true; but they did not advert to that circumstance, or else they would have overruled the case of *Re Ewin*.]

Re Ewin was decided on the grounds that the domicile and every other fact took place in England, except the situation of the property.

[Alderson, B. It is clear that the judges assumed, in *The Attorney General v. Jackson*, that the testator was in India.]

But his domicile was not in India.

[Alderson, B. When you ask what the decision in point of law is, you must stand upon the same facts upon which the decision was supposed to be founded.

Parke, B. You must look to the *ratio decidendi*.

Alderson, B. If they made a mistake, in the case of *The Attorney General v. Jackson*, in supposing that the domicile was in India, that has nothing to do with the legal question.]

Lord Lyndhurst, who was lord chancellor at the time of his decision in *Thomson v. The Advocate General*, was chief baron of the Exchequer when *Jackson v. Forbes* came before him with a British domicile.

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[*Alderson, B.* I do not know that it necessarily follows that he knew that Forbes's domicile was not in India.]

It was said in the argument, "No question of domicile arises here. The testator is a king's officer." It was clearly understood; and Lord Brougham, in giving judgment in the House of Lords in that case of *Jackson v. Forbes*, refers the House to Tyrwhitt's Reports, in which it is fully stated that no question of domicile was in dispute, as the testator retained his original domicile; and in *Arnold v. Arnold*, Lord Cottenham says, "The fact relied upon as subjecting the legacies to the duty is, that the property was remitted from India to England, and administered by the executors in this country. This was an unnecessary proceeding. It may be said, indeed, to be by mere accident that such a course was adopted, for it is obvious, that the executor in India having paid all the debts in India, and the executors in England having paid all the debts in this country, the former might, according to all the authorities, have avoided the question, by remitting the legacies direct to each legatee, or, instead of allowing them to pass through the hands of the personal representatives in this country, might have remitted them to an agent of his own, with directions to pay over the money to the persons entitled." Then his lordship refers to and approves of *Jackson v. Forbes*, in which he had argued as solicitor general for the crown, and therefore must be taken to have been conversant with the fact of the British domicile.

[*Alderson, B.* Where does it appear in the report, on the appeal of *The Attorney General v. Jackson*, that he was an officer in the king's service?]

In 8 Bligh, N. S. 315.

[*Alderson, B.* Not in Clarke & Finelly. It does not appear to have been observed.]

No; but Lord Lyndhurst and Lord Brougham were present in both cases of *The Attorney General v. Forbes or Jackson* and *Thomson v. The Advocate General*, and it must have been well known.

[*Alderson, B.* They must have imagined that all the cases were Indian domicils. Then, in putting the case of a foreigner with property in England, it implies that they thought Colin Anderson was, for the purpose of the argument, a foreigner; and the only question was, whether his property being in England made a difference.]

The case was fully considered in the Exchequer and in the House of Lords, and it was well known to Lord Cottenham that the testator was in the king's service.

[*Parke, B.* I do not think they adverted to that circumstance.]

Not in the decision in *Thomson v. The Advocate General*, I admit; it may be because, in Clarke & Finelly's Reports, they did not mention it.

[*Parke, B.* They seemed to have supposed, that, as he resided in India at the time, he was domiciled there — not adverting to the circumstance, that mere residence does not give a domicile. If you assume that, that is the ground on which it is reconciled with the judgment in the House of Lords, in *Thomson v. The Advocate General*,

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and the approbation given to that case is upon the supposition that residence and domicil were the same thing.]

The approbation of Lord Cottenham is not given on that ground in *Arnold v. Arnold*.

[*Alderson*, B. I think it is so.]

No; for Lord Cottenham had argued the case.

[*Parke*, B. They never appear to have argued that he was still domiciled in England, though living in India.

Alderson, B. In *Arnold v. Arnold*, Lord Cottenham put the case of a British born subject in the service of the East India Company dying in India as equivalent to the case of Colin Anderson in *The Attorney General v. Forbes*; and putting them together, how can you doubt that Lord Cottenham thought Colin Anderson was a company's officer? I thought I caught you to say, when you read it, that he said it was exactly like this case. Just read it again.]

"*The Attorney General v. Jackson*, therefore, is a decision of the very highest authority. The facts were in every respect the same as they are here."

[*Alderson*, B. Well, one of the facts there was, that the testator was a company's officer.]

On the contrary, Lord Cottenham's observation shows that he did not place his judgment upon domicil. The facts must have been derived from the reports, and they state the testator to have been a king's officer.

[*Parke*, B. I think it is clear they assumed that, residing abroad, he was domiciled abroad. They did not advert to the distinction between a company's officer and a king's officer residing and dying in the East Indies.

Alderson, B. Suppose the judges were to give their opinion upon a supposed state of the law, as not altered by a general or specific statute or act of Parliament, and had not adverted to that statute at all, and had given their judgment establishing a given principle, the *ratio decidendi* being clear, if you point out afterwards, that, if they had adverted to that statute, they would have decided otherwise, does that make their decision, on the grounds upon which they put it, wrong in principle? Would it not be quotable in a case, if the statute did not apply, just as well, even though it were a wrong decision? Lord chief barons are not infallible on a subject of fact. All the judges are supposed to know the statute law, which they do not.]

But it is quite clear here that Lord Cottenham was perfectly conversant with every fact.

[*Alderson*, B. He supposed that *The Attorney General v. Jackson* was like, in all respects, the case of *Arnold v. Arnold*. That was the case of a company's officer. He does not say that the distinction between a company's officer and an officer in the queen's service is utterly unimportant. If he had, it would have been very much in your favor.]

It is quite evident that he considered it to be so.

[*Alderson*, B. Both those cases proceed on the ground of domicil, and that alone.]

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Not *Jackson v. Forbes* or *Arnold v. Arnold*, surely. If you read Lord Cottenham's decision, you will see that there is nothing approaching to a reference to domicile.

[*Alderson, B.* He, no doubt, would have agreed with the decision in *Thomson v. The Advocate General*, if he had been fortunately in the House of Lords; but there was no contradiction to his judgment in *Arnold v. Arnold*.]

They imagined that the testator in *Jackson v. Forbes* was a company's officer. Lord Cottenham knew that he was not.

[*Alderson, B.* How do we know that?]

Because all the reports stated it.

[*Alderson, B.* Do you suppose every body reads every report? I have Clarke & Finelly's report, where it is not mentioned. You have a stronger case against Lord Lyndhurst than you have against Lord Cottenham. I do not think he knew it, or, if he did, he had forgotten it.

Parke, B. After several conflicting cases, they have laid down a principle which is very intelligible, and that is the principle adopted in the case of *Thomson v. The Advocate General*, namely, that personal property must be administered according to the law of the country where the possessor dies domiciled. His will must be made according to the law of the country where he was domiciled, and therefore, in that case of *Barnett*, which was before the delegates, of whom I was one, it was held, that a will made in Lisbon, in the English form, though intended to pass property in the English funds, must be made before five witnesses, according to the law of Lisbon, where he had been domiciled and had abjured the Protestant religion, though he fully intended to return to England. He made his will, and the delegates held that that will was void, not being made according to the law of the domicile, and that all questions respecting the personal property of the deceased were governed by the law of the domicile. Now, after some conflicting decisions, the courts have arrived at the same conclusion, with regard to the construction of the statute, as to the personal estate of a person deceased: it follows his domicile. Here you have the unanimous opinion of the judges in the case of *Thomson v. The Advocate General*. I agree it is in the converse of this case; not in this particular case. The principle laid down there, and adopted by all the judges and all the learned lords, Lord Lyndhurst, Lord Brougham, and Lord Campbell, is, that the law of domicile governs the question as to whether personal property is or is not subject to legacy duty. If it is, the personal property of a person who dies domiciled in England is liable to duty.]

If that be the result of that case, the House of Lords have overruled cases which they never intended to overrule, including *The Attorney General v. Jackson*.

[*Alderson, B.* It has been decided, that wherever the domicile is, there is the personal property. If that be so, here the domicile is in England.]

You must not leave *The Attorney General v. Jackson* out of your consideration. It is a decision of the House of Lords, in which the testator was a king's officer, and in which all the other facts and

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circumstances agree exactly with the facts in this case; and that decision of the House of Lords is approved of by Lord Cottenham.

PARKE, B., (without calling on the other side.) I consider the principle has been settled, and I think definitively settled, by the House of Lords, in the case of *Thomson v. The Advocate General*. There had been several cases conflicting before; there were some cases before the case of *Re Ewin*, which made the duty depend upon the assets being received in England. In *Re Ewin* the doctrine was first broached, that the true criterion whether the parties were liable to legacy duty was, whether the testator was domiciled in England, and that is the rule adopted by the judges in giving their opinion upon the case; and all their lordships, Lord Lyndhurst, Lord Brougham, and Lord Campbell, put it upon that great principle, that personal property is considered as being in the place where the owner of it is domiciled at the time of his death. It is said that if we act upon this decision in the House of Lords, we overrule another decision in the House of Lords, in the case of *The Attorney General v. Jackson*, or *The Attorney General v. Forbes*. It is quite true that if, in the case of *The Attorney General v. Jackson*, it had been held that at the time of the death of the testator he was domiciled in England, those cases would be overruled; but it is perfectly clear that they proceeded in that case without adverting to the distinction between residence and domicile. If you look at the reports of those cases, and the opinions afterwards given on those cases in the House of Lords, it is clear that they proceeded upon the assumption, that because the testator resided in India at the time of his death, he was there domiciled. The difference between a person residing abroad as an officer in her majesty's forces, and residing abroad in the East India Company's service, was never pointed out. The case of *The Attorney General v. Jackson* is, in truth, so considered, and is but another case falling within the same rule, and you must treat it as being domiciled in India. The English statute not extending to property in India, his property was exempt from legacy duty. Treat the case of *The Attorney General v. Jackson* as it was treated by the House of Lords in the case of *Thomson v. The Advocate General*, and it is exactly within the same principle. The distinction pressed upon us was never presented. The *ratio decidendi* falls exactly within the same principle as *Thomson v. The Advocate General*. This gives a very intelligible rule, though no doubt there seems a difficulty in applying it, because it is rather difficult in some cases to ascertain where a person's domicile was at the time of his death. There are no means of determining it in every case, but in some it is perfectly plain. This is a case in which Mr. Alcock has very properly not argued that the intestate's domicile was in the East Indies. If a natural born subject, domiciled in England, before he goes abroad enters into the service of the queen, and goes abroad at the queen's command into foreign service, it is clear that his original domicile has not parted with him. He goes for a temporary purpose, and is supposed to be there for a time, not to fix his permanent abode abroad. This officer was no doubt domiciled in England; and that being so, according to the

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plain, intelligible rule of law laid down by the House of Lords, this is a case in which the crown is entitled to the duties.

ALDERSON, B. I am entirely of the same opinion. It is quite clear that the case of *The Attorney General v. Forbes*, and the case of *Arnold v. Arnold*, were supposed to be by Lord Cottenham identical cases in the circumstances. It is now said, that in the case of *The Attorney General v. Jackson* the party was a British subject, one of the King's officers, residing in India at the time of his death; if so, he was certainly not domiciled. *The Attorney General v. Jackson*, upon the facts, was decided wrong; but the rule of law laid down in the case of *The Attorney General v. Forbes* was upon the supposition that the party was domiciled in India, and that the legacy duty in that case could not attach upon property which was situated in England at the time, because they said there that the property in England followed the domicile or the residence of the party in India. At that time it was supposed to be in India; and though it was, in fact, in England, legacy duty was not payable. In the case of *Arnold v. Arnold*, in like manner, legacy duty was not payable; and that was a right decision, both in point of law and fact. There the domicile was in India, he being a company's officer at the time, and his residence being there; therefore, when Lord Cottenham determined the case of *The Attorney General v. Jackson* and the case of *Arnold v. Arnold* to be the same, it is quite clear he proceeded on the supposition that in both cases the domicile was in India, and not in England. Then we have the authority of the House of Lords in the case of *Thomson v. The Advocate General*, and all the judges first, and their lordships unanimously afterwards, in so many words, say that the domicile governs. That is the principle, that where a man is domiciled, there is the personal property also. Now, apply that case. This person is domiciled in England; his personal property is, it is true — his local debts are debts paid — in India; but the personal property, following his domicile, is to be treated as being in England at the time of his death. He was in England in point of law, though he was in India in point of fact, because his domicile was in England, though his person was in India. His personal property, though in India, was legally in England also. Then the law of legacy duty applies to the property of all persons being English people, and the legacy duty must be paid. It seems to me, therefore, that the principle in the case of *Thomson v. The Advocate General* clearly governs this case. I cannot distinguish them.

*Rule absolute.*¹

¹ As the question was raised and argued in this way by consent, there can be no appeal.

The Eastern Counties Railway Company v. Broom.

IN THE EXCHEQUER CHAMBER.

[ERROR FROM THE COURT OF EXCHEQUER.]

THE EASTERN COUNTIES RAILWAY COMPANY v. BROOM.¹

Hilary Vacation, February 5, 1851.

Corporation — Trespass — Ratification of Authority.

Trespass will lie against a corporation.

An authority by a corporation to commit a tort need not be under seal.

The plaintiff below had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector. At the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings:—

Held, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to the company.

THIS was a writ of error upon a bill of exceptions tendered to the direction of Pollock, C. B. The action was in trespass for assault and false imprisonment, brought by Broom (the defendant in error) against the Eastern Counties Railway Company, and also against a person in their employment named Richardson. The defendants below had pleaded the general issue, and several pleas of justification. On the trial, it appeared that the plaintiff below had been taken into custody by one of the company's inspectors, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector. The solicitor of the company conducted the proceedings before the magistrate. The learned judge thought there was sufficient evidence to go to the jury, and left it to them to say whether the company were guilty of the trespass, and also whether it had been committed by their authority, or whether they had adopted it by their subsequent conduct. To this direction the defendant's counsel had tendered a bill of exceptions. The case was now argued before Patteson, Maule, Wightman, Erle, Williams, and Talfourd, JJ., by

Willes, for the plaintiffs in error. The question for the consideration of the court is raised under the general issue, as the other pleas were not substantiated. First, it is clear that a corporation cannot give authority to commit a trespass; it is a matter entirely beyond their power. If a man strike another, he does it with his natural, and not with his politic, body; were it otherwise, an action would lie against his successor. In 1 Bl. Com. 476, it is said, "It (a corporation) can neither maintain nor be made defendant to an action of battery, or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic;" and Br. Ab. tit. "Corporation," 63, is referred to. In Vin. Ab. tit. "Corporation," P. pl. 2, it is stated that "trespass does not lie against commonalty, but shall be brought

¹ 15 Jur. 297.

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against the persons by their proper names." Again, at Z. 2, "A corporation cannot be beaten in their corporate, but in their natural body; and a corporation cannot beat another, nor can they commit treason or felony in their corporate capacity." In Kyd on Corporations, 71, it is said, "Neither can it do or receive a personal injury, and therefore can neither sue nor be sued in an action of trespass for battery or false imprisonment." The case of *Reg. v. The Birmingham and Gloucester Railway Company*, 6 Jur. 804; 3 Q. B. 223, was one in which a corporation aggregate was indicted for disobedience to an order of justices requiring them to execute certain works according to a statute; there the order was valid, and the charge therefore against the corporation was for not doing that which it was their duty to do. He also cited Hawk. P. C. b. 1, c. 66, s. 13; *Reg. v. The Great North of England Railway Company*, 9 Q. B. 315; 10 Jur. 755, and *The King of the Two Sicilies v. Willcox*, 14 Jur. 751. But if the corporation are liable in this form of action, yet they can be made so only by the act of some person authorized by deed under their common seal. The authorities upon this point are numerous, but, perhaps, not precisely applicable. *Diggle v. The Blackwall Railway Company*, 14 Jur. 937, is one of the most modern. The rule itself is clearly established. Again, the company cannot be rendered liable for such an act as this by subsequent ratification of it; but if they can, there is no evidence here of such ratification. The attendance of the attorney before the magistrate cannot be construed into more than an attendance for the purpose of seeing that the proceedings were regular; the hearing was simply an inquiry, and the imprisonment after the hearing of the charge was the act of the magistrate. *Brown v. Chapman*, 12 Jur. 799, 6 C. B. 365; *Barber v. Rollinson*, 1 Cr. & M. 330. The doctrine of ratification does not apply to a case of assault and battery, as the act done should be beneficial to the ratifier; and an assault cannot be committed to the use of any one, nor can any fruits thereof result to any one. *Wilson v. Barker & another*, 4 B. & Ad. 614.

Watson. The first point relied upon by the other side depended upon a judgment delivered in the reign of Edward IV. by a judge who, fond of antithesis, had said that as a corporation had no body to be kicked, it could not commit an assault by kicking, for want of a foot to kick with. In a case like this, a corporation may be guilty of a trespass. It will be conceded by the other side, that if a company were, by deed under their common seal, to authorize an agent to seize land and also to remove persons, trespass *quare clausum fregit* would be maintainable for the first act; and surely it will not be contended that there is a remedy for only one half of the injury. There is no reason why a corporation cannot authorize an assault and battery to be committed; and if they do so, they are liable in trespass. All that the books say is, that corporations are not liable for murder or felony; but there is no authority against their being sued for a trespass. In the case of *Reg. v. The Great North of England Railway Company*, the cases were collected, and the distinction made between nonfeasance and misfeasance. It was there said by Lord Denman,

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C. J., "The Court of Common Pleas lately held, *Maund v. The Monmouthshire Canal Company*, 4 Man. & G. 452; 6 Jur. 932, that a corporation might be sued in trespass, but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases; but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large. The late case of *Reg. v. The Birmingham and Gloucester Railway Company*, 6 Jur. 804; 3 Q. B. 223, was confined to the state of things then before the court, which amounted to nonfeasance only, but was by no means intended to deny the liability of a corporation for a misfeasance. We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public know nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means of deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it,—that is, the corporation acting by its majority,—and there is no principle which places them beyond the reach of the law for such proceedings." Nothing could be stronger than that. In a case of this sort the company may obtain some benefit by reason of the act complained of; they may remove a dangerous or offensive person from their premises, and bring him before a magistrate; and by the 256th section of their act, the magistrate may impose a fine of 5*l.*, one half of which goes to the company. If a corporation can command an act to be done, why cannot they ratify? The case falls within the general rule laid down in Com. Dig. tit. "Trespass," C. 1. There may be many instances where an assault is beneficial to the employer; but that is immaterial, as the law does not recognize any distinction upon that ground. The company, in this case, had ratified the trespass; they had therefore adopted it *ab initio*, and had become liable. There was sufficient evidence for the jury to infer such adoption.

[*Talfourd, J.* There are numerous cases of nonsuit, where the trespass has been simply appearing before the magistrate. *Stokes v. White*, 1 C. M. & R. 223. *Sharrod v. The London and North-western Railway Company*, 4 Exch. 580; *Bird v. Brown*, 14 Jur. 132; and *Wilson v. Tunnan*, 12 Law J. Rep. (N. S.) C. P. 306; 6 Man. & G. 236, were also cited.]

Willes, in reply. An act may be rendered legal by subsequent adoption, but then it must be with full knowledge of all the circumstances. *Buron v. Denman*, 2 Exch. 167. That is essential, and unless there is such knowledge there can be no ratification. If the inspector had been guilty of a wrongful act by pulling a man out of a carriage, he was no servant of the company for that purpose; his act was not their act, nor were they liable for him or for his statements as to the authority he had received. *Freeman v. Rosher*, 13 Jur. 881.

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PATTESON, J. In this case there seems no reason why we should defer our opinion. The first question arises on the declaration itself, and is quite independent of the evidence. Whatever was the law, as laid down in the year books and elsewhere, it has undoubtedly, in modern times, been held that trespass would lie against a corporation. An action of trover was held good against the Bank of England some years ago. *Yarborough v. The Bank of England*, 16 East, 6. There is no doubt that a corporation cannot beat or be beaten; but it cannot be said, that, if they authorize any one to do so, they are not liable for the act. We are clearly of opinion that there may be cases in which an action of trespass will lie against a corporation; and if so, the declaration is good, independently of the particular evidence in this case. The second point has been long settled, and it is not necessary that an authority to commit a *tort* should be under seal. On the third point, although the bill of exceptions is not drawn so carefully as it ought to be, yet it seems that, at the close of the plaintiff's case, the defendants contended that there was no evidence to go to the jury, and counsel subsequently excepted to the direction of the lord chief baron; and we think, that although there were some evidence of the by-laws, there was no direct evidence of previous authority. Then as to the question of ratification. It is stated that Richardson took the plaintiff out of one of the railway carriages because he had no ticket, did not pay his fare, and was drunk; he then imprisoned him, took him before a magistrate, and made a charge against him, and the evidence of ratification is the attendance of the company's attorney when such charge was preferred. But there is nothing to show that it was known to the company that the plaintiff was in custody: they might be entirely without a knowledge of his imprisonment. How can a man ratify that of which he is ignorant? Then, can this be said to be for the benefit of the company? because, if so, they might ratify. In this case, we think that the assault and imprisonment was an act which might be beneficial to them, but we also think there was no evidence of ratification to go to the jury, and therefore the direction of the lord chief baron was wrong. Under the circumstances, there must be a *venire de novo*.

*Judgment accordingly.*¹

¹ It seems to be well settled in this country also, that trespass will lie against a corporation for *torts* authorized or commanded by them. *Leyman v. The White River Bridge Co.*, 2 Aikens, 255. *Dater v. The Troy T. & R. R. Co.*, 2 Hill, 629. *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Wendell, 9. *Chestnut Hill, &c. T. Co. v. Ruiter*, 4 S. & R., 16. *Whitman v. W. & S. Railroad Co.*, 2 Harrington, 514.

But it was held in *Philadelphia, &c. R. R. Co. v. Wills*, 4 Wharton, 143, that trespass would not lie against a railroad corporation for an injury to the plaintiff, by the defendant's locomotive, whether such injury was wilful or accidental on the part of the

servants of the company, if it does not appear that the injury was done by the command or with the assent of the corporation; and that for such injury the proper remedy would be an action on the case.

In Ohio, it has been held that neither trespass for an assault and battery, *Orr v. Bank of M. S.*, 1 Ohio, 36; nor trespass *quare clausum fregit*, *Foot v. City of Cincinnati*, 9 Ohio, 31, will lie against a corporation; but this last is directly opposed to the case of *Bloodgood v. The Mohawk & Hudson R. R. Co.* above cited, and other cases.

See, further, Angell & Ames on Corporations, c. 11, s. 7, and notes.

Sadd v. The Maldon, Witham, and Braintree Railway Company.

SADD v. THE MALDON, WITHAM, AND BRAINTREE RAILWAY COMPANY.¹

January 22, 1851.

Railway Clauses Act, 8 Vict. c. 20, s. 16, 45 — Compulsory Taking of Lands — Limits of Deviation — Time — Branch Line.

A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the Railways Clauses Act, 8 Vict. c. 20, s. 16, to take compulsorily, within the time for completing the railway and works, any lands situate within the limits of deviation for the purpose of making a branch railway.

SPECIAL CASE. The defendants, being a company incorporated by act of Parliament for making and maintaining a railway called the Maldon, Witham, and Braintree Railway, constructed the line and opened it for traffic about the 1st of October, 1848, but the station at the Maldon terminus, and the works, &c., connected therewith, were in an unfinished state at that time. On the deposited plan a parliamentary centre of the line was designated, and on each side thereof certain limits of deviation were marked out. The company constructed their line to the left of the parliamentary centre of the line marked on the plan, but within the limits of deviation. The plaintiff was seized in fee of a wharf on the River Blackwater, and was also the lessee of a strip of land, both of which pieces of land were within the limits of deviation. In September, 1848, the defendants commenced making, and afterwards, and after the 1st of October, 1848, but within the time limited for the execution of their powers, without the consent of the plaintiff proceeded to construct, and laid down and constructed, a line of rails and the works necessary for supporting and carrying the same through the said two pieces of land, and communicating with the said river, for the purpose of facilitating the communication between the river and the railway and station, and for the purpose of receiving, depositing, loading and unloading goods to be carried upon the railway, and for the more convenient using and working of the same, which last-mentioned line of rails was also within the limits of deviation, shown on the said deposited plans.

The plaintiff contended that the company were not authorized to take any part of the said two pieces of land without his consent for the purposes aforesaid. The defendants contended, that it was one of the works and conveniences authorized by the acts to be made within the prescribed limits of deviation, and that they were entitled to take the same without the plaintiff's consent, under the compulsory clauses of the statutes.

The question for the opinion of the court was, whether the defendants were justified under the powers of the special act, and acts incorporated therewith, in constructing the said works through the said two pieces of land without the plaintiff's consent. If the court should be of opinion that they were not, judgment by confession was

¹ 20 Law J. Rep. (N. S.) Exch. 102.

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to be entered, damages 10*l.*; if otherwise, a *nolle prosequi* was to be entered.

Bramwell, for the plaintiff. The defendants were not entitled to take the two pieces of land in question without the consent of the plaintiff. By sects. 20 and 24 of their local act, 9 & 10 Vict. c. 52, the defendants were authorized to make a railway, and to take not more than twenty acres for extraordinary purposes. The 8 Vict. c. 20, the Railways Clauses Consolidation Act, 1845, by sect. 45, empowers the company to take by consent the prescribed number of acres for extraordinary purposes. This amount is to be taken for conveniences extra the actual line. In *Cotter v. The Midland Railway Company*, 2 Ph. 469; s. c. 17 Law J. Rep. (N. S.) Chanc. 235, Lord Chancellor Cottenham says, "I consider that all land authorized to be taken, as necessary, in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether necessary for the actual line of the railway or for stations or other conveniences necessary for the working of the railway." The plaintiff contends that the land proposed to be taken by the defendants is not required for a necessary station, but is a mere way-leave. It is not a part of the line. Without doubt, the defendants might have taken this land in the first instance for their main line; but having made their main line, they cannot take it for the purpose of making a branch.

[*Parke*, B. This land is within the limits of deviation; why may they not take it?]

Because, having made their line, they have no power to make another. The case falls within the 45th section of the 8 Vict. c. 20.

Bovill, for the defendants. The defendants do not rely on the 45th section; but, on the contrary, contend that it does not apply to this case. They rely on the 16th section, which enacts, that "subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the *accommodation works* connected therewith, hereinafter mentioned, to execute any of the following works, (that is to say,) they may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or *permanent* inclined planes, tunnels, embankments, aqueducts, bridges, roads, *ways*, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper." The land proposed to be taken is either a part of the main line, or it is an accommodation work authorized to be made under that section.

[*Alderson*, B. It is a permanent way, within the meaning of that section.]

All that Lord Cottenham decided in *Cotter v. The Midland Railway Company* was, that all land authorized to be taken for making

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the railway and works was liable to be taken, if necessary, for stations or other conveniences necessary for the working of the railway. He cited and referred to *Beardmer v. The London and North-western Railway Company*, 1 Mac. & Gor. 112; s. c. 18 Law J. Rep. (N. S.) Chanc. 432. *The Attorney General v. The Eastern Counties Railway Company*, 10 Mee. & W. 263; s. c. 12 Law J. Rep. (N. S.) Exch. 106. *Priestley v. The Manchester and Leeds Railway Company*, 4 You. & C. 63. [He was then stopped by the court.]

Bramwell replied.

POLLOCK, C. B. The defendants are entitled to judgment, and to have a *nolle prosequi* entered. The question is, whether, looking at the maps and plans, the notices given, and the fact of the special act being incorporated with the Railways Clauses Act, the defendants were entitled to make a communication between their terminus and any part of the River Blackwater within the limits of deviation prescribed by the special act. This question depends on the 16th section of the Railways Clauses Consolidation Act. [His lordship read the section.] This section explains the meaning of the word "works." Now, the company are to judge of the propriety of the works which they propose to execute, and if they act in an unjust and arbitrary manner, as, for instance, by taking land with a view to favor the business of one man's wharf and to injure that of another, without any regard to public convenience, they would, probably, be restrained by a court of equity. But we have nothing to do with that point, and have merely to decide whether the defendants were entitled to make their branch railway. I think they were entitled, for they are within the limit as to time, which extends to three years, and they are within the prescribed deviation as to space. The distinction attempted to be made between works of necessity and works of convenience utterly fails. The defendants are at liberty to take certain lands within the 16th section, and as they have complied with the provisions of the acts of Parliament with respect to the restrictions of time and space, they are entitled to take the land in question under that section of the act of Parliament.

PARKE, B. I am of the same opinion. If there had been no 16th section, a question might have arisen as to the power of the defendants to take this land; and I do not give any opinion as to what their power would have been irrespectively of that section. But upon the 16th section, I have no doubt that the defendants were authorized to make this communication with the river; they had not exhausted all the powers given them by the act, and they had not finished all their works. I think they had the power of taking this land, for they are within the limitations both as to time and space imposed on them by the acts of Parliament. The 45th section of the 8 Vict. c. 20, does not apply to this case, for that has reference to so much land for additional conveniences only as land owners may be willing to sell them, the amount being limited in this case to twenty acres. That

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section does not control the 16th section, nor is the point at all affected by the judgment of Lord Cottenham, in *Cotter v. The Midland Railway Company*.

ALDERSON, B. If the special act and the Railways Clauses Act are read together, the case is quite free from doubt. The 20th section of the 9 & 10 Vict. c. 52, empowers the railway company to make "a railway and works," but does not define what is meant by those words. They are, however, defined by the 8 Vict. c. 20, s. 16. That section gives the company the power, amongst other things, of making a permanent way. That has been done in this case, and such a way is within the limits prescribed by the acts of Parliament both as to time and space.

PLATT, B., concurred.

Judgment for the defendants.

MUNGEAN v. WHEATLEY & another.¹

January 18, 1851.

Certiorari, quashing — Replevin — 9 & 10 Vict. c. 95, s. 9, and 13 & 14 Vict. c. 61, s. 1 & 2 — Attachment.

A writ of *certiorari* was granted by a judge to two defendants to remove a plaint of replevin from a county court on an affidavit stating that the rent exceeded 20*l.*, 9 & 10 Vict. c. 95, s. 121. No previous application had been made to the county court judge. At the trial, the defendants presented the *certiorari*, and one of them offered to make the declaration under the 121st section, stating that the other was unable to make it. They also tendered a bond conditioned to prove in the superior court that the rent was more than 20*l.* The sureties were not approved by the clerk of the court. A rule *nisi* for an attachment had been granted against the judge for not receiving and returning the *certiorari*. The court refused, on the above grounds, to quash the *certiorari*.

The judge of the county court is bound before allowing the *certiorari* to see that the requirements of the 121st section have been complied with: e. g., that the declaration is made, that the bond is given, and that the names of the sureties are given, and approved by the clerk of the court.

An action of replevin having been brought in the county court for Kent, held at Gravesend, the defendants, on the 4th of November, 1850, obtained a writ of *certiorari* on an affidavit which stated that the rent exceeded the sum of 20*l.*, but no declaration to that effect had been made, nor a bond with sureties, pursuant to the 121st section of the 9 & 10 Vict. c. 95, had been entered into before the county court judge previously to obtaining the writ of *certiorari*. On the 8th of November, the day on which the trial was to take place, both parties attended with their counsel and attorneys in the county court, when the defendants presented the writ of *certiorari*, stating

¹ 20 Law J. Rep. (N. S.) Exch. 106.
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that they were ready to enter into the bond with sureties, and that one of them was prepared to make the declaration required by the 121st section, but that the other could not make the declaration. They also tendered and offered to execute a bond pursuant to that section, the condition of which bond was that they should prove before the superior court that the rent in respect of which the distress was made exceeded the sum of 20*l*. The clerk of the court having received no notice of the sureties until the 6th of November, stated that he had not had time to inquire into the sufficiency of the sureties proposed, and that, therefore, he did not approve of them. Several objections were made on the part of the plaintiff to the allowance of the writ of *certiorari*, and the county court judge being of opinion that it ought to be disallowed by him, disallowed it, and tried the cause, in which the plaintiff obtained a verdict. A rule *nisi* for an attachment was afterwards obtained against the judge of the county court, for not receiving and returning the *certiorari*.

Horn now moved for a rule calling upon the defendants in this case to show cause why a writ of *certiorari* obtained by them should not be quashed on the ground that the writ had issued im-providently, and that the requisites of the County Courts Acts, 9 & 10 Vict. c. 95, s. 90 and 121, and 13 & 14 Vict. c. 61, s. 1, had not been complied with. First, the *certiorari* is bad, inasmuch as before the application to the judge at chambers for a *certiorari*, the defendants ought to have made the declaration and entered into the bond required by sect. 121 of the County Courts Act, before the judge of the county court. It may also be a question whether he ought not also to comply with the requisitions of sect. 90, previously to obtaining the writ. In *Morten v. Morten*, which was decided by Rolfe, B., at chambers, and which is reported in Mr. Milward's work, on the county courts, p. 7, that learned judge quashed a writ of *certiorari*, on the ground that it had been obtained without a previous compliance with either the 90th or the 121st sections. Secondly, conceding that the writ was properly issued by the judge at chambers, without any previous application to the judge of the county court, it ought now to be quashed, inasmuch as the sureties were not approved by the clerk of the court, pursuant to sect. 121. Thirdly, the declaration required by sect. 121 was made by one only of the two defendants. Fourthly, the bond was conditioned that the defendants should prove before the superior court that there was ground for believing that the rent exceeded 20*l*.; whereas; by virtue of the County Courts Extension Act, 13 & 14 Vict. c. 61, s. 1, 2, the condition of the bond ought to be, that there was ground for believing that the rent exceeded 50*l*. The 121st section of the 9 & 10 Vict. c. 65, applies to the removal of replevins that are beyond the jurisdiction of the court; that is, to cases where a right to a toll, fair, market, &c., is in question under sect. 58, and to cases where the rent exceeds 50*l*. It is true that sect. 121 speaks of a bond for 20*l*.; but when it is considered that that section relates only to the removal of replevins that are without the jurisdiction, and that the 13 & 14 Vict. c. 61, s. 1, 2, gives the court jurisdiction to

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the extent of 50*l.*, and enacts that all the "powers and provisions" of the first County Courts Act shall extend to all debts and demands not exceeding 50*l.*, and that the two acts "shall be read and construed as one act," the result seems to be that any bond given under sect. 121 must be conditioned for proving that the rent exceeds 50*l.*, instead of 20*l.*, as required under the first County Courts Act. The plaintiff seeks to set aside this *certiorari*, in order that he may be able to issue his execution safely for the judgment and costs.

[*Pollock*, C. B. The plaintiff had better take courage and proceed with his execution. If he is right in his view of the invalidity of the writ of *certiorari*, he may say to the defendants, You have no right to require obedience to the writ, for you have not complied with the requisites of the statute.

Alderson, B. The last three objections may be shown for cause against making absolute the rule for the attachment, but they form no ground for quashing the writ.]

POLLOCK, C. B. I think this rule must be refused. The object of the *certiorari* is to remove the plaint; but the act of Parliament says that something is to be done before the writ of *certiorari* is to be acted upon. If that is not done, the judge may disobey the writ, but there is no occasion to quash it. It is like the case of a *capias ad respondendum* issued against a member of Parliament, which the party issuing it puts in force at his peril. The judge, for instance, must see that the sureties are given and approved by the clerk of the peace, and if they are not, he is justified in disobeying the writ. But there is no ground for quashing the writ.

PARKE, B. We need not now grant this application. The plaintiff may wait until the judge of the county court acts upon the writ of *certiorari*. I am inclined to think that, under sect. 121 of the act, the party who seeks to remove the plaint must satisfy the judge of the county court that the amount in dispute is beyond his jurisdiction before the case can be removed.

ALDERSON, B. I am of the same opinion. The bond to be given by the party who removes the plaint must contain a condition that the party removing it shall "prove before the court by which such suit shall be tried" that the rent exceeded 20*l.* It may be, that as a party could not tell in what court it would be tried until the plaint had been actually removed into some court, the *certiorari* ought to be issued before the declaration is made and the bond given. We need not, however, decide that question now.

Rule refused.

Parker v. The Bristol and Exeter Railway Company.

PARKER v. THE BRISTOL AND EXETER RAILWAY COMPANY.¹

January 29, 1851.

County Court — 9 & 10 Vict. c. 95 — 13 & 14 Vict. c. 61 — *Certiorari*
— *Money had and received.*

Semble, that a *certiorari* may still issue under 9 & 10 Vict. c. 95, s. 90, to remove a cause from the county court, notwithstanding 13 & 14 Vict. c. 61, s. 16; but, —

Held, that all the material facts relative to the state of the cause should be brought before the judge upon the application for the writ; and therefore, where a *certiorari* had been obtained without the judge having been informed that the cause had already been heard for several days in the county court, the writ was set aside as having been issued improvidently.

THIS action was commenced by a plaint in the county court of Bristol, on the 31st of October, 1850, and was brought against the defendants as common carriers, to recover a sum of 50*l.* for alleged overcharges in the carriage of goods. The cause came on to be heard on the 19th of November, and having occupied six days in the hearing, was adjourned till the 23d of January. On the 20th of that month, the defendants made an *ex parte* application to a judge at chambers for a *certiorari* to remove the cause into this court, on the ground that it involved a question of a right to toll, and, consequently, that the county court had no jurisdiction by the 9 & 10 Vict. c. 95, s. 58; and also, that it raised a difficult point of law, namely, the right of the company to charge separately for the various parcels carried by them for the plaintiff in one package. Their affidavits did not disclose that the cause had already lasted six days, but merely stated "that it had come on for trial, and was then pending."

A rule had, on a previous day, been obtained to quash the *certiorari*, on the ground that the power to issue it was taken away by the 13 & 14 Vict. c. 61, s. 16, and also that the material facts had been suppressed upon the application to the judge, against which

Kinglake, Serj., showed cause. The power to issue a *certiorari* is not affected by the 13 & 14 Vict. c. 61, s. 16. The 2d section of that statute enacts that this act and the 9 & 10 Vict. c. 95, and the 12 & 13 Vict. c. 101, shall be read and construed as one act, as if the several provisions in the said recited acts contained not inconsistent with the provisions of this act were repeated and reenacted in this act. Then the 9 & 10 Vict. c. 95, s. 90, enacts, "that no plaint entered in any court holden under this act shall be removed or removable from the said court into any of her majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed 5*l.*, and then only by leave of a judge of one of the said superior courts, in cases which shall appear to the judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit." And the 16th section of the last act enacts,

¹ 20 Law J. Rep. (n. s.) Exch. 112.

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"that no judgment, order, or determination given or made by any judge of a county court, nor any cause or matter brought before him or pending in his court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." The two statutes are, therefore, to be read as one act; and the provisions of the first statute regulate the manner in which a *certiorari* is to be issued. The point has been so decided at chambers, both by Parke and Platt, BB. Then, in this particular case, the *certiorari* was properly obtained, because the question at issue involved the construction of the sections of the Bristol and Exeter Railway Acts as to tolls.

[Parke, B. The simple question was, whether, in fact, the defendants had charged more than they were entitled to do for carrying the plaintiff's goods. There was no right or title to toll to discuss. They received the goods as carriers.]

Lush, contra. Without arguing the effect of the recent statute upon the power of removal by *certiorari*, it is submitted that this writ was obtained upon a suppression of the facts. Large expenses had been incurred by the plaintiff; and the judge ought to have been informed of the position of the cause, that he might impose proper terms upon granting the writ. No toll is in question; and if there were, prohibition, not *certiorari*, would be the proper remedy. The law is settled, that the railway company had no right to charge the plaintiff more than other persons. *Parker v. The Great Western Railway Company*, 7 Man. & G. 253; s. c. 13 Law J. Rep. (N. S.) C. P. 105.

POLLOCK, C. B. This rule must be made absolute; not, however, on the ground that the *certiorari* is taken away by the recent statute, respecting which I entertain no doubt that it is not, but because it was necessary to state to the judge on the affidavits the real position of the cause, in order that he might impose on the parties such terms as might seem fit in his discretion.

PARKE, B. I am of the same opinion. I have not the least doubt, and this is not the first time that I have had to consider the question, that the *certiorari* is not taken away in cases like the present. The words of the 16th section of the recent act are, that it shall be taken away in all cases, "save and except in the manner and according to the provisions hereinbefore mentioned." Then look at the provisions before mentioned; one is in the second section, "that this act and the act 9 & 10 Vict. c. 95, shall be read and construed as one act as if the several provisions in the said recited act contained, not inconsistent with the provisions of this act, were repeated and re-enacted in this act." The provision of the former act allowing a *certiorari* is by no means inconsistent with the right of appeal given by this act. They may both well stand together, and therefore the present statute is to be read as if that clause was in it. This appears

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to me to be perfectly clear, although it will not be necessary to pronounce a binding opinion on the point; for this rule must be made absolute on another ground, namely, that in bringing the case before the judge, the defendants did not show him the facts so as to enable him to impose the proper conditions. If they had disclosed all the facts, the judge would not have given an absolute writ, but qualified it with terms. There is no difficult point of law in the case, as that was settled by the decisions in *Parker v. The Great Western Railway Company* and *Pickford v. The Grand Junction Railway Company*, 10 Mee. & W. 399; and the question at issue was a mere matter of detail.

ALDERSON, B., concurred.

MARTIN, B. I agree, except that I must say that if the point should again arise which came before the Court of Common Pleas in *Parker v. The Great Western Railway Company*, as to whether an action for money had and received can be maintained, I should wish to see it discussed in a court of error.

*Rule absolute.*¹

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY v. BURNSIDE.²

January 11, 1851.

Railway — Action for Calls — Holder of Shares — Bankruptcy and Certificate — Acceptance by Assignees — Future Debt — Contingent Debt.

Debt for railway calls. Pleas, *secondly*, that the defendant was not a holder of the shares; and *thirdly*, bankruptcy of the defendant. The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of the shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16; but before the *fiat* a correspondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the *fiat* and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. Afterwards, and after the *fiat*, three calls were made:—

Held, first, that there was no evidence of the assignees having accepted the shares.

Secondly, that the debt was not barred by the certificate, as it was not provable under the *fiat* as a debt due *in futuro*, within sect. 51 of the 6 Geo. 4, c. 16, or as a debt due on a contingency within sect. 56.

DEBT for railway calls.

Pleas—First, never indebted; *secondly*, that the defendant was not the holder of the shares; *thirdly*, that the defendant became a bankrupt before action, and that the causes of action accrued to the plaintiffs before such bankruptcy.

¹ The court intimated that the defendants might apply again to a judge at chambers, but that the plaintiff should have notice of the application, that he might attend.

² 20 LAW J. Rep. (N. S.) Exch. 120.

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At the trial, before Rolfe, B., at the Lancashire Spring assizes, 1850, the facts proved were these: The defendant was the holder of twenty shares, of 20*l.* each, in the South Staffordshire Railway Company; and the action was brought to recover from him the sum of 118*l.* in respect of calls due on these shares. Four calls had been made, and after the making of the first, upon which no question arose, the defendant became a bankrupt, on the 8th of February, 1848, and a *fiat* was issued on the 23d of February, 1848. Assignees were appointed, and a correspondence took place between the official assignee and the trade assignee, in the course of which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares on which the calls were made, and estimating the probable amount that would be forthcoming to work the *fiat* and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. The defendant obtained his certificate on the 24th of April. Three calls were made subsequently to the *fiat*.

Under these circumstances, the learned judge was of opinion that the plaintiffs were entitled to recover, and the jury accordingly found a verdict for them, leave being given to the defendant to move to enter a verdict for him if the court should be of opinion that the assignees had accepted the shares, or that the debt was barred by the certificate.

Crompton showed cause, (June 17 and 18.) Until the assignees were registered in lieu of the bankrupt, the latter remained liable to the payment of calls. The effect of the Bankrupt Act is, not to pass onerous property until the assignees clearly assent to take it; that is, in this case, until they come in and say they assent to be shareholders. *Sayles v. Blane*, 19 Law J. Rep. (N. S.) Q. B. 19, shows that, until the deed of transfer of railway shares has been registered, the transferrer continues the registered owner, and is liable for the subsequent calls. *The Midland (Ireland) Great Western Railway Company v. Gordon*, 16 Mee. & W. 804; s. c. 16 Law J. Rep. (N. S.) Exch. 166, is to the same effect. The 14th section of the 8 Vict. c. 16, the Companies Clauses Consolidation Act, authorizes the transfer of shares. The 15th section enacts, that the deed of transfer shall be delivered to the secretary, who is to register the same, and until the deed has been delivered to the secretary, the vendor shall continue liable to the company for the calls, and the purchaser shall not be entitled to the profits or to any vote. The 18th section enacts, that in the case of transmission of shares by death, bankruptcy, insolvency, or marriage, certain forms and regulations shall be observed, and unless they are observed the transmittee shall not be entitled to a share in the profits or to any vote. Those forms and regulations had not been adopted here, and therefore the property did not pass to the assignees. Secondly, there is no evidence of the assignees having accepted these shares, and unless they do some act to manifest their assent to the transfer, the property in the shares vests in the bankrupt. *Copeland v. Stephens*, 1 B. & Ald. 593. Henley on Bank-

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ruptcy, p. 237, last ed. *Herbert v. Sayer*, 5 Q. B. Rep. 965; s. c. 13 Law J. Rep. (N. S.) Q. B. 209. *Boorman v. Nash*, 9 B. & C. 145; s. c. 7 Law J. Rep. K. B. 150, is also in point. Thirdly, the certificate of the bankrupt is no bar to these future calls. They could not constitute a debt, for it was not certain that any calls would be made. These calls could not be proved under the commission. *Toppin v. Field*, 4 Q. B. Rep. 386; s. c. 12 Law J. Rep. (N. S.) Q. B. 148, shows that a bankrupt is not discharged by his certificate from breaches of covenant in not paying insurance premiums that have accrued due after his bankruptcy.

Martin and *J. Addison*, in support of the rule. First, this is the case of a debt payable on a contingency within the 56th section of the Bankrupt Act, 6 Geo. 4, c. 16. The shareholder is a debtor to the company to the amount of his share. It is *debitum in presenti solvendum in futuro*. The calls are capable of valuation, and there is no difficulty in proving for them. Secondly, the conduct of the assignees of the bankrupt amounts to an acceptance of the shares. Letters passed between the official and the trade assignees, in which the latter makes a statement to the former of the bankrupt's property, including the value of the shares on which calls had been made, and estimating the probable amount that would be forthcoming to work the *fiat* and to pay dividends. He afterwards wrote to the same party, and suggested the propriety of selling the shares. The provision in the 15th section of the 8 Vict. c. 16, which enacts, that the transfers of shares shall be registered, was intended to facilitate the company's means of proving what parties were the proprietors. But the vendee, notwithstanding the non-compliance with that enactment, became liable to the payment of calls at the suit of the company. If the assignees in this case have assented to take these shares, the act has the effect of passing the property to them. There is a difference in the proceedings required by the act in cases where the shares are transferred voluntarily, and where they are transmitted in consequence of the death, bankruptcy, insolvency, or marriage of a female shareholder. By the 18th and 19th sections a declaration is made necessary. The holder of shares for the time being is the party who is made liable by the act of Parliament. They referred to 1 & 2 Will. 4, c. 56, s. 25. Lastly, this is a debt provable under the commission. A claim under a guaranty for a sum certain, when due, is provable as a debt. *In re Willis*, 4 Exch. Rep. 530; s. c. 19 Law J. Rep. (N. S.) Exch. 30. The cases cited on the other side are cases of liquidated damages. In the present case the liability to pay the calls is a direct, not a collateral, liability. They referred to *Atwood v. Partridge*, 4 Bing. 209; s. c. 5 Law J. Rep. C. P. 154. *Wills v. Murray*, in error, *post*, and *Newton v. Scott*, 10 Mee. & W. 471; s. c. 12 Law J. Rep. (N. S.) Exch. 488.

PARKE, B. The Companies Clauses Consolidation Act points out a mode by which the assignees of a bankrupt may take possession, and this they have not followed. Had they intended to take the

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property in the shares, they would certainly have pursued this course. The question then is, whether there is any evidence of their having accepted these shares. I think there is not, and that the shares are not transferred to them; whether the shares still remain in the bankrupt is a point as to which we must take time to consider.

ALDERSON, ROLFE, and PLATT, BB., concurred.

Cur. adv. vult.

The judgment of the court was now given by

PARKE, B. The case of *The South Staffordshire Railway Company v. Burnside*, which was heard before my brother Alderson, my brother Platt, my Lord Cranworth, and myself, was argued before us, at the sittings after Trinity term, on showing cause against a rule to enter the verdict for the defendant. The action was brought by the railway company for calls. [His lordship stated the pleadings and the facts.] Under these circumstances the learned judge was of opinion that the plaintiffs were entitled to recover, and the jury accordingly found a verdict for them, leave being given to the defendant to move to enter a verdict for him, if the court should be of opinion that the assignees had accepted the shares, or that the debt was barred by the certificate of bankruptcy. As to the first call, there is no question that the plaintiffs clearly are not entitled to recover that. As to the other, it was contended, for the defendant, first, that there was evidence that the assignees had taken the shares; consequently, that the shares had vested in them by assignment before the three calls were made; and if so, the bankrupt would be no longer a holder, and therefore not liable. We intimated our opinion during the argument that there was no sufficient evidence to warrant the jury in coming to that conclusion, and of that opinion we remain.

The property of the shares continuing in the bankrupt, the next question is, whether the company are barred by the certificate, on the ground that that was a debt provable under the *fiat* as a debt due *in futuro*, under the 51st section, or on a contingency within the meaning of the 50th section of the 6 Geo. 4, c. 16. That it was not a debt *in presenti* payable *in futuro*, we consider to be quite clear. The statute which enables the company to recover the calls, no doubt merely enforces the obligation on the shareholders to pay by contract. If the defendant contracted with the company to take twenty shares, on each of which a deposit was paid, he may be said to have agreed with them to pay 20*l.* per share, by such instalments, according to the statute, as they were entitled to require; if he purchased the shares from another, he may be considered as having taken on himself the contract of the vendor to the like effect; but under this section, taken from the 7 Geo. 1, c. 31, s. 1, a debt under such a contract could not be proved. It was uncertain how much of the 20*l.* per share the exigencies of the company would call for, nor could it be told what the time of the payment would be, and consequently at what period the interest would have to be paid. The clause of the statute 7 Geo. 1 applies only to certain debts owing at the time of the bankruptcy,

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payable at a certain time. It was so laid down by Lord Eldon, in *Ex parte Barker*, 9 Ves. 114, in effect overruling the case of *Ex parte Mitford*, 1 Bro. C. C. 398. It is clear, therefore, that this debt could not have been proved under the 51st section. Is, then, a debt payable upon a contingency a contract on which a statutory obligation is founded, which is not to pay a certain fixed sum on a future contingency, but such sum or sums as may be required from himself and all the other shareholders, from time to time, not exceeding in the whole a certain sum, to be regulated by the wants of the company? At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted. But in order to bring the case within the 56th section, the bankrupt must have contracted a certain debt before the bankruptcy, payable after it on a contingency. The clause was meant to meet cases which were considered as operating very harshly, and which the 51st section did not comprise, such as sums payable under a marriage settlement of the bankrupt after his death, or that of the survivor. *Ex parte Marshall*, 1 Mont. & Ayr. 118; s.c. 3 Law J. Rep. (n. s.) Bankr. 37. If it were also necessary that the contingency should be such as to be capable of valuation, as was held in the case of *Ex parte Eagle*, 1 Mont. & M'Ar. 422; s.c. 8 Law J. Rep. Chanc. 96, by Lord Lyndhurst, and *Ex parte Marshall*, this is a contingency which never could be the subject of valuation, depending not merely on the wants of the company, but the ownership of the shares at the time they were entitled to call; for if he has parted with the shares, the bankrupt would be no longer responsible. However, it does not seem necessary that it should be capable of valuation. *Ex parte Marshall*, and *In re Willis*. Therefore, we do not decide that this case does not fall within the 56th section on that ground; but on the other ground, that of the uncertainty of the claim, we are of opinion that it does not. The situation of the bankrupt in respect of the shares bears close resemblance to that of a lessee who has become bankrupt, and who continues liable after he has become bankrupt, for the rent. A contract to pay rent *in futuro* is not a debt contracted at the time of the bankruptcy, and cannot be proved under a *fiat* against him. We may add, to make a bankrupt's estate liable to pay dividends on the full amount of the sum subscribed for, when no other shareholders were required to pay, nor sure to be required to pay a call, would put him in a worse situation than the others, and would be obviously unjust. We think, therefore, this rule must be discharged.

Rule discharged.

Hutton & others, Assignees of Allport, v. Cooper.

HUTTON & others, Assignees of ALLPORT, v. COOPER.¹

January 22, 1851.

Bankrupt — Execution — Seizure and Sale — 12 & 13 Vict. c. 106, s. 133, 184.

The seizure of a trader's goods under an execution in an action commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is before or after the seizure.

THIS was a special case for the opinion of this court, the material facts of which were as follows: The defendant, J. Cooper, obtained judgment in an action commenced adversely against one T. Allport, being a trader liable to the bankrupt laws, and issued a *fi. fa.* thereon the 11th of April, 1850. The goods were seized on the 12th. T. Allport signed a declaration of insolvency on the 15th, which was filed on the 16th, and on the 17th a petition of adjudication was filed, and adjudication made on the 18th. The sale under the *fi. fa.* was subsequent to the adjudication; and the question for the court was, whether the assignees of the bankrupt, T. Allport, were entitled to recover the value of the goods, notwithstanding the execution.

Bramwell, for the plaintiffs. The 12 & 13 Vict. c. 106, s. 184, decides the question.²

T. Jones, contra. The execution is protected, it being in an adverse action, and the seizure having taken place before the act of bankruptcy. The 133d section does not apply.³ The words "notwithstanding any

¹ 20 Law J. Rep. (N. S.) Exch. 123.

² That section enacts, "That no creditor, having security for his debt, or having made any attachment in London or in any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon or any mortgage of or lien upon any part of the property of such bankrupt before the date of the *fiat* or the filing of a petition for adjudication of bankruptcy: Provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, *cognovit*, or consent to a judge's order declared to be null and void by any provision of this act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney, *cognovit*, or consent."

³ That section enacts, "That all payments really and *bona fide* made by any bankrupt, or by any person on his behalf, before the date of the *fiat* or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt, and all payments really and *bona fide* made to any bankrupt before the date of the *fiat* or the filing of such petition, and all conveyances by any bankrupt *bona fide* made and executed before the date of the *fiat* or the filing of such petition, and all contracts, dealings and transactions, by and with any bankrupt really and *bona fide* made and entered into before the date of the *fiat* or the filing of such petition, and all executions and attachments against the lands and tenements of any bankrupt *bona fide* executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt *bona fide* executed and levied by seizure and sale before the date of the *fiat* or the filing of such petition, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, provided the person so dealing with

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prior act of bankruptcy," are copied from the 2 & 3 Vict. c. 29, and the construction put upon them in *Whitmore v. Robertson*, 8 Mee. & W. 463; s. c. 11 Law J. Rep. (N.S.) Exch. 43, must be considered. In none of the bankrupt acts is a seizure before an act of bankruptcy rendered invalid, and the court will not, unless compelled, introduce such a new provision. The 184th section cannot be construed literally, for a person who has obtained the fruits of an execution by sale is no longer a creditor. That section only applies to creditors by *cognovit*, warrant of attorney, or judge's order.

POLLOCK, C. B. We are all of opinion that judgment must be given for the plaintiffs. The 184th section is clear. It was intended by that section to introduce a new state of things; that whereas before there were questions of notice, and whether the seizure was before or after the act of bankruptcy, there should in future be one clear rule, applicable to all but the excepted cases of warrants of attorney, &c. And that rule is, in substance, that unless the execution is completed by seizure and sale before the filing of the petition for adjudication, the execution creditor must come in ratably with the other creditors.

PARKE, B. I am of the same opinion. It is perfectly plain that the execution is defeated by the 184th section. At common law, the execution was to be satisfied out of the goods belonging to the debtor at the *teste* of the writ; and although, by the statute of frauds, the delivery to the sheriff was made the period from which the writ bound the goods, yet if, by the neglect of the sheriff, the debtor became bankrupt before seizure, the creditor lost his right under the execution by virtue of the 21 Jac. 1, c. 19, s. 9, and subsequent statutes. But all these are now repealed by the present statute; and if no provision had been made to the contrary, then the judgment creditor would have a right to the fruits of the execution. But sect. 184 is clear and distinct. The execution must be served and levied by seizure and sale. It becomes, therefore, unnecessary to consider the 133d section. The 184th section is somewhat improperly worded, because after sale the execution creditor ceases to be a creditor; but it no doubt means, that no person who has issued an execution shall take any benefit from it, unless he not only seizes but sells before the petition for adjudication. The act is certainly very serious, as no plaintiff who has

or paying to, or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or *cognovit actionem* or judge's order obtained by consent given by any bankrupt by way of fraudulent preference."

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issued execution can now allow any delay, but must sell immediately under the *fi. fa.*

ALDERSON, B. I am of the same opinion. The words "notice of any prior act of bankruptcy," in the 133d section, mean prior to the sale.

PLATT, B., concurred.

Judgment for the plaintiffs.

ANDREWS & others, Assignees of THOMPSON, v. DIGGS.¹

Hilary Term, January 31, 1850.

Bankruptcy — 6 Geo. 4, c. 16, s. 108 — *Execution under Judge's Order* — *Judgment by Confession.*

An execution issued upon a judge's order is an execution obtained by "confession" within the 6 Geo. 4, c. 16, s. 108. Therefore, where a debtor's goods were seized under an execution issued upon a judge's order, and an act of bankruptcy was afterwards committed by the debtor, and a *fiat* issued before the sale, the assignees of the bankrupt were held to be entitled to the goods.

THIS was an interpleader issue, to try whether certain goods of Thompson, a bankrupt, which had been seized under an execution at the suit of the plaintiff, an execution creditor, were liable to be sold by the sheriff, on the 24th of September, 1849.

At the trial, before Rolfe, B., at the Westminster sittings in Hilary term, 1850, it appeared that the plaintiffs were the assignees of Thompson, a bankrupt, and the action was brought to recover the price of goods seized by the defendant under an execution against Thompson. The execution, which was *bona fide*, was founded upon a judge's order given by the bankrupt to the defendant. After the execution, a declaration of insolvency was filed by Thompson, on the 29th of September, and notice of the claim of the plaintiffs was given to the defendant on that day. A *fiat* in bankruptcy issued on the 1st of October, at which time no sale by the sheriff had taken place. For the defendant, it was contended that the execution was valid by virtue of the exception contained in the enacting part of the 6 Geo. 4, c. 16, s. 108, and did not fall within the proviso at the end of that section, as the execution had not been obtained "by default, confession, or *nil dicit*." The learned judge was of opinion, that the defendant's execution fell within the proviso in the 108th section, and therefore was not valid as against the assignees and the other creditors, and the plaintiffs had a verdict accordingly.

Montagu Chambers now moved for a new trial, on the ground of misdirection. The defendant is entitled to the fruits of his execution,

¹ 20 Law J. Rep. (n. s.) Exch. 127.

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for this was not the case of a "judgment obtained by default, confession, or *nil dicit*," within the 108th section of the 6 Geo. 4, c. 16. It was a judgment by *non sum informatus*.

[Parke, B. The judge's order is drawn up by consent, and confesses the cause of action.]

The word "confession" means "*cognovit*." The words in the proviso have a technical meaning well known to the profession.

[Pollock, C. B. To limit them to the three old modes of judgment would defeat the objects of the statute.]

The same words occur in the 1 Will. 4, c. 7, s. 7. Here the proceeding was adverse, because the consent of the bankrupt was obtained by pressure. In the late Bankruptcy Law Consolidation Act, 12 & 13 Vict. c. 106, s. 133, validity is not to be given to "any execution founded on a judgment on a warrant of attorney or *cognovit actionem*, or judge's order, obtained by consent given by any bankrupt by way of fraudulent preference." That shows that the legislature did not think that the case of a judge's order had been provided for by previous acts. He also cited and referred to *Whitmore v. Robertson*, 8 Mee. & W. 463; s. c. 11 Law J. Rep. (n. s.) Exch. 43; 2 & 3 Vict. c. 23, and Chitty's Forms, 583.

POLLOCK, C. B. We cannot grant a rule. The case is quite clear. The question turns upon the meaning of the word "confession," in the 108th section of the 6 Geo. 4, c. 16. In the case of an order by consent, the substance of the transaction is, that the party gives his consent to an order, and it is not important whether the judgment operates instantly or afterwards upon a condition broken. How would the judgment be drawn up? The form in Mr. Chitty's book states it to be by consent, &c., of the plaintiff and the defendant, and after stating the amount of the debt and costs, and averring that they are unpaid, it says, "which premises the defendant doth not deny." The latest act of Parliament on the subject, the 12 & 13 Vict. c. 106, in the 133d section, notices judges' orders, which were not noticed before, and shows that a judge's order is not a *cognovit actionem*. The spirit of the bankruptcy acts has always been to procure a fair and equal division of the bankrupt's property amongst the creditors. By the early bankrupt acts, the relation to the act of bankruptcy goes back to a great extent. Subsequently to those acts, other statutes have passed, and amongst them Sir Samuel Romilly's Act. Then came the act of 2 & 3 Vict. c. 29, which carried the protection to parties further. The object of the 108th section is, that where there have been voluntary judgments, the execution creditor shall not have any advantage, but there shall be a distribution for the benefit of all the creditors. In this case, there has been no adverse proceeding. The parties went before a judge, and took out a writ. This is a judgment by confession even in form.

PARKE, B. This is not the first time I have had to consider whether a judgment obtained under a judge's order was a judgment by confession. That is the sole question in this case. A judgment entered

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by confession on the record, would be supported on the ground that the defendant had agreed to confess the action. By the course of proceeding, a judgment, to be entered by "confession," would be correct, not by force of the judge's order, but because the defendant admits that the action is well founded, and that the plaintiff is entitled to recover. It is like the case of a reference under a judge's order, which has its efficacy by reason of the consent. The 108th section of the 6 Geo. 4, c. 16, relates to judgments by confession. In the 12 & 13 Vict. c. 106, the 133d section extends to judges' orders. Undoubtedly this is not a case of judgment by default, or by *nil dicit*, but the defendant has agreed that judgment shall be entered for a certain amount. Nor is this the case of a judgment against an adverse party, but an action is brought, and an amount is admitted to be due. This case is not within the 2 & 3 Vict. c. 29, for that applies to cases where the act of bankruptcy has taken place prior to the seizure; but here the act of bankruptcy was subsequently to the seizure.

PLATT, B. I agree with the rest of the court. The word "confession," in the 108th section, is not to have the limited meaning contended for by Mr. Chambers. This is certainly not the case of a judgment by default, or *nil dicit*. Is it, then, a judgment by confession? It is, substantially, a judgment by confession, as it could not take place without consent being given to the issuing of execution. The language of the 1 Will. 4, c. 7, s. 7, shows that the legislature meant two different things by the terms "confession and *cognovit actionem*," or they would not have made use of the alternative word "or." The 12 & 13 Vict. c. 106, s. 133, confirms this view of the case, for there a judge's order is treated as different from a *cognovit*. The only execution that is protected is an adverse one; and it is idle to call this an adverse execution. It is like the execution of a warrant of attorney. The judge was therefore right in holding that this case was within the 108th section of the 6 Geo. 4, c. 16.

ROLFE, B. I concur with the rest of the court, and am glad that the point has been raised, because it was stated that a different opinion prevailed among the profession, namely, that judges' orders were not within the 6 Geo. 4, c. 16. The question is, whether this was the case of a judgment by confession. I think it was; and I even go so far as to say that it falls within the words "*cognovit*" and "*nil dicit*." If this question is divested of technicality, what does a *cognovit* amount to? It is this, that a party has recognized his opponent's right to recover in an action. Now, whether this judgment is drawn up in form, or effected by a judge's order, is quite beside the question. The principle is, that one creditor is not to have an advantage over others, where there is a contract between the parties. This is not an adverse proceeding any more than a fine and recovery. It is merely the machinery by which the agreement between the parties is effected.

Rule refused.

CROWN CASES

RESERVED

FOR THE CONSIDERATION AND DECISION

OF THE

COURT OF CRIMINAL APPEAL;

DURING THE YEARS 1850 AND 1851.

WESTERN CIRCUIT.

[Before MR. JUSTICE TALFOURD.]

REGINA v. ROBERT COURTICE BIRD & Wife.¹

Devonshire Spring Assizes, 1850.

Murder — Evidence — Joint Assault.

Prisoners were indicted for the murder of their servant girl by, *inter alia*, a series of beatings.

The evidence proved a series of beatings within the time charged in the indictment, but it was distinctly proved by the surgeon, that these beatings did not produce or even conduce to her death. The cause of death was proved to be by two blows upon the head, but there was no evidence to show how or by whom they were inflicted, or by which of the prisoners, or by both of them:—

Held, that in the absence of any such proof, there was no case for the jury of murder by the said blows in the head, and an acquittal was directed.

ROWE, Q. C., and *Karslake* were for the prosecution. *Slade* and *E. W. Cox*, for the prisoners. The prisoners were indicted for the wilful murder of Mary Ann Parsons.

The following is a copy of the indictment:—

Devonshire, to wit: The jurors for our lady the queen, upon their oath, present, that Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, laborer, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace

¹ 5 Cox, C. C. 1. In order to a complete understanding of the decision of this case in the Court of Criminal Appeal, *post*, p. 448, it was deemed advisable to insert the preliminary trials before Mr. Justice Talfourd,

and before R. Gurney, Esq., *post*, p. 439. For the same reason the indictments and arguments of counsel are in this case given in full, as repeated reference is made to them in the opinion of the court.

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of God and our said lady the queen then and there being, unlawfully, feloniously, wilfully, and of their malice aforethought, did make an assault, and that the said Robert Courtice Bird, and Sarah his wife, with a certain stick, of the value of a penny, which they, the said Robert Courtice Bird, and Sarah his wife, in their right hands then and there had and held, the said Mary Ann Parsons, in and upon the head, chest, shoulders, back, arms, legs, and thighs of her the said Mary Ann Parsons, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird, and Sarah his wife, giving to the said Mary Ann Parsons then and there, thereby, to wit, with the stick aforesaid, in and upon the head, chest, shoulders, back, arms, legs, and thighs of her the said Mary Ann Parsons, divers mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, in the year aforesaid, until the 4th day of January, in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird, and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, feloniously, wilfully, unlawfully, and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, and Sarah his wife, late of the same parish, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and time between that day and the 3d day of January, in the year of our Lord 1850, to wit, on the 1st day of December, in the year of our Lord 1849, and the 1st day of January, in the year of our Lord 1850, respectively, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our said lady the queen then and there being, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did make divers, to wit, ten, assaults; and that the said Robert Courtice Bird, and Sarah his wife, with a certain stick, to wit, of the value of one penny, which they the said Robert Courtice Bird, and Sarah his wife, in their right hands, then and there, to wit, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, had and held, the said Mary Ann Parsons, in and upon the head, chest, shoulders, arms, legs, and thighs of her the said Mary Ann Parsons, then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird, and Sarah his wife, to the said Mary Ann Parsons then and there, thereby, to wit, with the said stick, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, giving

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to the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs, and thighs of her the said Mary Ann Parsons, divers, to wit, ten, mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, in the year aforesaid, and the several other days aforesaid, until the 4th day of January, in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, on their oaths aforesaid, do say that the said Robert Courtice Bird, and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, feloniously, wilfully, unlawfully and wickedly, and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Third count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and times between that day and the 3d day of January, in the year of our Lord 1850, to wit, on the 1st day of December, in the year of our Lord 1849, and 1st day of January, in the year of our Lord 1850, respectively, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our said lady the queen then and there being, feloniously, wilfully, wickedly, and unlawfully, and of their malice aforethought, did make divers, to wit, ten assaults; and that the said Robert Courtice Bird, with a certain stick of the value of one penny, which he the said Robert Courtice Bird in his right hand then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, had and held, and the said Sarah, the wife of the said Robert Courtice Bird, with a certain other stick of the value of one penny, which she the said Sarah in her right hand then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, arms, legs, and thighs of her the said Mary Ann Parsons then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, feloniously, wilfully, wickedly, unlawfully, and of their malice aforethought, did respectively strike and beat, they the said Robert Courtice Bird and Sarah his wife, respectively, to the said Mary Ann Parsons then and there, thereby, to wit, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, with the several sticks aforesaid, so held by them respectively as aforesaid, at the parish aforesaid, in the county aforesaid, giving with this, that they respectively, then and there, thereby gave to the said Mary Ann Parsons, in and upon the head, chest, shoulders, arms, legs, and thighs of her the said Mary Ann Parsons, divers, to wit, ten mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, in the year of our Lord aforesaid, and the several other days aforesaid, until the 4th day of January,

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in the year of our Lord 1850, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, and county aforesaid, of the said mortal bruises so given as aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wilfully, unlawfully, wickedly, and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Fourth count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 5th day of November, in the year of our Lord 1849, and on divers other days and times between that day and the 3d day of January, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our said lady the queen then and there being, feloniously, wilfully, unlawfully, and of their malice aforethought, did make divers assaults; and that the said Robert Courtice Bird and Sarah his wife, with a certain scourge, to wit, a scourge made of certain leather thongs, to a certain stick affixed, of the value of a penny, which they the said Robert Courtice Bird and Sarah his wife in their right hands then and there, to wit, at the several times aforesaid, at the parish aforesaid, and county aforesaid, had and held, the said Mary Ann Parsons in and upon the head, chest, shoulders, back, arms, legs, and thighs of her the said Mary Ann Parsons, then and there feloniously, wilfully, and of their malice aforethought, did strike and beat, they the said Robert Courtice Bird and Sarah his wife giving to the said Mary Ann Parsons then and there, thereby, to wit, with the scourge aforesaid, at the several times aforesaid, at the parish aforesaid, in the county aforesaid, in and upon the head, chest, shoulders, back, arms, legs, and thighs of her the said Mary Ann Parsons, divers mortal bruises, of which said mortal bruises the said Mary Ann Parsons, from the said 5th day of November, and the said other days and times, until the said 4th day of January, in the year of our Lord 1850 aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said several mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Fifth count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 1st day of January,

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in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our lady the queen then and there being, feloniously, wilfully, wickedly, and unlawfully, and of their malice aforethought, did make an assault; and that the said Robert Courtice Bird, with both his hands, and the said Sarah Bird, with both her hands, the said Mary Ann Parsons to and against the ground, then and there feloniously, wickedly, wilfully, unlawfully, and of their malice aforethought, did cast and throw, by which said casting and throwing the said Mary Ann Parsons to and against the ground, the said Robert Courtice Bird and Sarah Bird, then and there gave the said Mary Ann Parsons divers mortal bruises, in and upon the head, stomach, sides, and back of her the said Mary Ann Parsons, of which said mortal bruises the said Mary Ann Parsons, from the said 1st day of January, in the year of our Lord 1850, until the 4th day of January, in the year of our Lord 1850, to wit, then and there, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish aforesaid, in the county aforesaid, of the said mortal bruises died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wickedly, wilfully, unlawfully, of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

Sixth count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird and Sarah his wife, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the 1st day of January, in the year of our Lord 1850, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our lady the queen then and there being, feloniously, wilfully, wickedly, and unlawfully, and of their malice aforethought, did make an assault; and that the said Robert Courtice Bird, then and there, with both his hands, and the said Sarah, the wife of the said Robert Courtice Bird, then and there, with both her hands, the said Mary Ann Parsons to and against the ground then and there feloniously, wickedly, wilfully, unlawfully, and of their malice aforethought, respectively, did then and there cast and throw, and that the said Robert Courtice Bird then and there, with both the feet of him, the said Robert Courtice Bird, and the said Sarah, the wife of the said Robert Courtice Bird, then and there, with both the feet of her the said Sarah, whilst the said Mary Ann Parsons being so then and there cast and thrown to and against the ground, then was then and there upon the ground, the said Mary Ann Parsons in and upon the head, stomach, back, and sides of her the said Mary Ann Parsons, then and there feloniously, wickedly, wilfully, and unlawfully, and of their malice aforethought, did respectively then and there strike, beat, and kick, they the said Robert Courtice Bird and Sarah his wife, then and there, respectively, as well by the casting and throwing of her, the

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said Mary Ann Parsons, to the ground, as aforesaid, as also by the striking, beating, and kicking the said Mary Ann Parsons in and upon the head, stomach, back, and sides of her the said Mary Ann Parsons, in manner and form aforesaid, while on the ground as aforesaid, then and there thereby giving to the said Mary Ann Parsons divers, to wit, twenty mortal bruises in and upon the head, stomach, back, and sides of her the said Mary Ann Parsons, of which said mortal bruises so caused as aforesaid, the said Mary Ann Parsons, from the said 1st day of January, in the year of our Lord 1850, until the 4th day of January, in the year of our Lord 1850, then and there, to wit, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live, on which said 4th day of January, in the year last aforesaid, the said Mary Ann Parsons, at the parish and in the county aforesaid, of the said mortal bruises so given as aforesaid, died. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Robert Courtice Bird and Sarah his wife, the said Mary Ann Parsons, in manner and form aforesaid, by the means aforesaid, feloniously, wickedly, wilfully, and unlawfully, and of their malice aforethought, did kill and murder, against the peace of our lady the queen, her crown and dignity.

In his opening to the jury, *Rowe* relied for a conviction upon proof of a series of ill usages between the 5th of November and the 26th of December; and he concluded thus: The prisoners were charged with the capital offence. No doubt, by the law of England, if persons, by a series of acts of ill usage and ill treatment, done wilfully, produced the death of another, that, in the eye of the law, was murder. But the question, whether they did it wilfully—whether it was a premeditated act—was entirely for the consideration of the jury, looking at the facts, and under the direction of the judge.

The material facts proved were as follows:—

Grace Parsons. I live at Bideford, and am the mother of the deceased. I saw her after her death on the 4th of January; she was 14 years old in November last. Mrs. Bird had told her that she ordered the child to go down into the kitchen for water the Thursday, and with that she came down, and fell down twice. Then when the child falled down again, they sent the little boy up stairs; and as he was going up with the light, the girl called out, "Don't bring up a light, for I can't bear it in my eyes." Then the little boy came back, he did not go up; but Mrs. Bird went up after to see what she wanted. She said she asked the girl what she wanted, and if she wanted to come out of the bed, and then Mr. Bird went up himself, took the child out, and put her on the chamber utensil. When he lifted her up again, they said they heard something running down, and found that the place the child had in her arm had broke, and there was a discharge. That when Mrs. Bird asked the child how she was, she replied, "Very sleepy—when it's all quiet, missis, I shall be able to sleep a bit, by and by." That then both went down stairs; how long they staid Mrs. Bird did not say, but after that she went up stairs again, and found the child's feet and legs very cold.

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That she went down stairs again, took a jar, and filled it with the boiling water, and put it to the child's feet and legs. That then she went down stairs again, and on afterwards returning up stairs, found the child's feet and arms cold, but her face quite warm. With that she went down after another jar of water, which she carried back and put upon the child's arms. Some time in the night she told me that she called out to her husband to go up and see if Mary was dead. That then Mrs. Bird went into the room — that she spoke to the girl, and she did not answer; she was looking smiling — she had not moved, and where she had left the jars she found them. That she spoke to an old man who slept in the same room, three times before he spoke to her. She said, "I think Molly's dead, for she's very quiet;" and then the old man said, "I think her is, for I've spoke to her several times, and there was no mouth speech."

Cross examined by Mr. Slade. When witness asked her why she had not sent for the doctor, Mrs. Bird replied, "Well, that's the only thing I know I'm in fault." When Mrs. Bird said she had flogged her several times, witness observed there was a mark in the head; Mrs. Bird replied, there had been a tumble, and then gave her the account of the fall by the settle.

William Johns, mason, of Buckland Brewer. Lives about a mile and a half from Gawland, which is a lone farm standing by itself, the nearest house being more than half a mile off. In the month of November last, witness was at Gawland, knew the Birds, Courtice, the uncle, and the deceased. No one but these persons lived in Gawland in November, besides the prisoner's children, the eldest of which is about six or seven years old. Witness was at work there on the 5th of November. Heard the voice of the female prisoner; the door was open, and she was scolding the deceased something about the pig's meat. During this time he also heard blows, and after the blows he heard the girl crying. As soon as she began to cry, the door was shut. After that he heard more blows, and still heard the girl crying. A few minutes after, the girl (deceased) came out; there was blood on her face. Witness spoke to her, and she showed him some marks in her left arm, just above the elbow; they appeared to have been made with a stick. There was also a mark across the neck, of the same kind. The maid gave a knock at the door, and one of the little boys went. Presently mistress got up and went out to the girl, and told her in a loud voice to wash off the blood from the back of her neck, directly.

Richard Hopper, a farm laborer of Buckland. About three or four weeks before I was examined by the magistrates, I saw the girl, who did not appear healthy then. I saw her the day after Christmas day; she then appeared very ill. I saw two or three drops of blood drop from her. On the back part of her head there was a cut. Sarah Bird came out and told the girl to go in. The girl's shoulders and arms had bruises on them. I saw Sarah Bird flog the girl three or four weeks before Christmas, with a hazel, or nut stick, across the shoulders. About a fortnight before Christmas, I saw Bird strike the girl twice, with a furze stub, across the shoulders, and she cried.

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Mr. Charles Colwell Turner. I am a surgeon of Bideford; I have been in practice there nine years. I went into the room with Branch where the body lay; I caused her to strip the body. I saw on the legs and thighs several wounds, varying in extent, and apparently inflicted by some irregular weapon — it struck me, by a birch. On the chest below the left collar bone were two slight bruises; his attention was also attracted to the discoloration of the face and forehead, which extended from the left temple down the cheek. Also saw some wounds and abscesses on the arms, and also on the fingers; the skin over the bowels was also discolored. The wound on the left arm was an abscess above the elbow, with the skin immediately around it discolored; it had the appearance of a bruise of long standing — perhaps a fortnight — and the abscess had burst. On the front of the same arm, below the elbow, was also an abscess, which was just forming. The nails on the little finger, and index or forefinger, appeared to have been gone some time. Those on the middle finger and fourth finger more recently, but all were gone. On the outer part of the right arm, above the elbow, was another abscess, which also had recently burst. The body was then turned over. On the right hip there was a large sloughing wound, about the size of the palm of the hand; and on the posterior part of the hips were several wounds, which appeared to have been inflicted some time; they were covered with plaster, on removing which they appeared to be old sores. Between the two shoulders were two trivial bruises. The outer layer of skin on the back, in some places, was separated from the inner, which I thought resulted from the serous part of the blood having exuded after death, from between the two layers of skin. From the state of the back and abdomen, I cannot specify how long the child had been dead when I saw it, but it had evidently been dead some days, (on the Saturday.) In giving that answer, I have taken into consideration the state of the weather, which at that time was extremely cold; that state of weather would retard the symptoms of decomposition in a dead subject. I was then desired by the coroner to make a *post mortem* examination, which I did immediately. On removing the skull, I discovered another bruise at the back part of the head, which, being covered with hair, I had not before noticed. There was considerable extravasation of blood, that had oozed between the scalp and the skull. On removing the skull, I found the membranes of the brain extremely congested; the skull itself was perfectly sound. On gently moving the brain, I found at the base extravasation of blood. I then examined the chest, the contents of which I found perfectly healthy, with the exception of a slight adhesion of the right lung to the side. The stomach was perfectly empty, and the different organs of the brain perfectly healthy, and in a normal state. I made no further examination, as I felt that I had arrived at the cause of death, which I attributed to external injuries on the head, causing the extravasation which I found within. From the external appearance of the wounds in the head, I can form no judgment of the way in which that violence was inflicted; it would certainly take much heavier blows to cause death in a healthy than an unhealthy subject, a strong rather than a weak constitution. The

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state of the deceased before death I should think was extremely reduced, and the effect of the external injuries which she had received, without taking the injuries of the head into consideration, would be to reduce the powers of life. These injuries would affect the nervous system, and the nervous system is connected with the brain.

Cross examined. From the extent of surface of the wounds which I have supposed might have been inflicted by a birch, I consider they would have affected the nervous system. The wounds on the finger might, some of them, have been the result of frost bites, but not the cuts in the legs. The abscesses might possibly have been produced by constitutional debility, but the sloughs were the result of external wounds. Frost bites would not have caused the sloughs. A severe bruise might have produced the slough on the hips; a fall might, but not such a blow as might have been received against a bed post. The symptoms disclosed in examination of the brain were similar to those found in persons who died of apoplexy. Extravasation at the base is the most rapid in its effect; previous to extravasation there is congestion, and congestion, if the result of natural causes, could produce giddiness, and giddiness leads to falls; but he did not think that a fall merely on the floor, unless from a height, would produce such an extensive bruise as was found in deceased's head. A person laboring under incipient congestion would shun the light, the glare would be painful, and be an indication of the disease, if coupled with other symptoms. Observed no sign of a kick on the private parts, which were discolored, but not from the effects of a blow. In cold weather, chaps of the skin very often became bleeding wounds. The blood spoken of by the witness Hopper might have resulted from natural causes. The frost-bitten fingers indicated a low state of the body, and a languid circulation, and that languid circulation tended to a congestion of the liver, the brain, or some important organ. It did not follow that languid circulation would be produced by taking a person from a confined place like a workhouse, and exposing her more to the open air. Wounds after death have a worse appearance than they have before death.

Reexamined. The symptoms which witness has spoken of as appearing on deceased's back and abdomen could not have been produced before death, and showed that deceased had been dead thirty hours, at least. In witness's experience, such appearances as he had described could not have taken place in less than three days. Incipient congestion of the brain would depend very much on the nervous system of the subject. Having examined the corpse, and heard the evidence, he thought that incipient congestion might have arisen from the causes mentioned by the witnesses.

By his Lordship. Taking all the circumstances into consideration, he believed that the extravasation was caused by external injuries.

Mr. John Edye. I have been practising as a surgeon in Exeter for twenty-six years, and am also one of the surgeons of the hospital. I have heard the evidence to-day. From the statement of Mr. Turner, I conceive he is correct in the opinions that he has formed as to the

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time which had elapsed between his visit and the death of the child; but I should not like to speak positively unless I had seen the child. I concur with Mr. Turner in the opinion that he has formed as to the cause of death.

HIS LORDSHIP asked *Rowe* what he presented to the jury as to the cause of death. He had himself been certainly under considerable difficulty on the matter. He had thought that the kick spoken of by one of the witnesses was the cause of death, until the medical witnesses gave evidence to the contrary, and declared that death was caused by a blow on the head, producing extravasation of the brain, and resulting in death.

Rowe suggested that there was the treatment which had been spoken of, which had the effect of so lowering the frame, that death might have resulted from violence which would not have produced it in a healthy person.

HIS LORDSHIP thought that would involve the principle that one person having pursued a course of harsh treatment, weakening the constitution, another party would be liable to an indictment for murder, if he inflicted violence not likely in itself to cause death, and which would not have resulted in death, but for the previous violence inflicted by another party.

Rowe. There is another proposition, whether death was not caused by incipient congestion of the brain, produced by a long series of bad usage. Mr. Turner stated that a series of acts of bad usage would affect the nervous system and affect the brain, and render it more sensible of injury.

After some observations from *Slade* and *Cox*, it seemed to be the opinion of the counsel, as well as of his lordship, that the case could not be sustained, although there was no doubt that the poor girl had been ill treated.

The learned JUDGE then addressing the jury, said he regretted not being able to allow this case to go to its legitimate termination, but it was his duty to tell them at once he thought the prosecution had failed. He briefly reviewed the circumstances under which the girl had been placed in the family of the prisoners, in a lonely farm house. Up to a certain time, Mrs. Bird seemed to have been satisfied with her; at any rate, she said she was a good girl. But after that, a fearful change came over the transaction. She was seen to inflict chastisement, which, although his lordship did not for one moment approve of it, still, if it could be regarded as a single instance of passion, might have excited but little notice. The girl appeared to have failed in health; she was found dead on the fifth of January, and lamentable injuries were on her person. There must probably have been some violence used by some one, or some neglect. If, in Mr. Turner's judgment, the external

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injury he saw had directly contributed to death, then the jury would have had to consider the conduct of the prisoners, as bringing home to them either manslaughter or murder; but to sustain either of these charges, it must *first* be distinctly made out that the unlawful act of the prisoners was the cause of death. Now two gentlemen of skill had been called; one had examined the head, and found the cause of death *there*, namely, the pressure of blood on the brain, or that which is commonly called apoplexy—an overcharge of the vessels upon the brain till they burst, and there is an effusion of blood on the brain which stops the functions of life; and he attributed this to the injury at the back of the head, which was either from a blow or a fall. There was no proof of any actual injury inflicted which could be the cause of death, except the injury at the back of the head. Now if that injury proceeded from a kick or blow inflicted by either of the prisoners, no doubt it would be manslaughter or murder. It would be murder if done with a weapon likely to endanger life, or with the purpose, disposition, and determination to kill or to do some grievous, serious, and permanent bodily harm. If it had been a sudden act of passion, or a gross and brutal excess of chastisement, that had occasioned her death, which had not been contemplated nor reasonably to be expected, then it would have been aggravated manslaughter. But the difficulty here was, there was no proof at all who it was that gave the blow. It was true, the jury might indeed suspect it was one of the prisoners, as there was no one else in the house but the old man, the uncle. In the absence, however, of all *proof*, his lordship could not direct the jury that there was any evidence that affected *one* more than the other of the persons at the bar. Each of them had chastised the girl before, and either *might* have inflicted the blow. But the case was in this difficulty, which he thought fatal to the prosecution. He could not direct them there was any thing to lead them to connect one of the prisoners more than the other with that which was clearly by the evidence the cause of death. If it was inflicted by one, the other aiding, both would be guilty; but in the total absence of all proof of that kind, his lordship could see nothing to direct the jury to either. The case indeed presented considerations which, he confessed, made him lament that he was not in a situation to leave this question to the jury; for the circumstances called for solemn and deliberate inquiry, and he deplored the case being left in such a state of uncertainty that he could not direct them to say whether there was any evidence that both inflicted the blow, or, if one, which inflicted it, or at what time, and under what circumstances. Therefore, he was bound to tell them he thought the case for the prosecution had failed in bringing home that fatal blow, to which the surgeons attributed death, to either of the prisoners at the bar. If the death had been caused by want of food, then the male prisoner alone would have been guilty, for it was *his* duty to provide proper sustenance. If death were caused by accumulated wrongs and injuries during the time she was in the house, that would have been another question. But, as the medical man had stated that the death was caused by effusion of blood, and that by external violence; and

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as there was no proof how or by whom that violence was inflicted, it seemed to him that the case had failed, and therefore, however they might regret that they could not enter into it on moral considerations, he was bound to tell the jury that, there being no proof which of them did it, they could not *legally* convict either, and consequently both must be acquitted.

Verdict, not guilty.

WESTERN CIRCUIT

[Before R. GURNEY, Esq., Q. C.]

REGINA v. BIRD & Wife.¹

Devonshire Summer Assizes, Exeter, August 5, 1850.

*Autrefois acquit — Practice — Counsel — Evidence — Bail —
Case reserved.*

To sustain a plea of *autrefois acquit*, it is not sufficient merely to put in the record of the first indictment and acquittal. Some evidence must be given to show that the offences charged in the former and present indictment are the same, and this may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and if that is consistent with the charge in the second indictment, it will be a presumptive case, which must be met by the prosecution by proof that the offence charged in the second indictment was not the same as that charged in the first.

The counsel in the case may be examined, to show from his notes, taken at the former trial, what was the evidence then given.

Where a case has been reserved for the court of appeal upon a conviction for an assault with intent to commit a felony, the court will not deem itself bound to admit the prisoner to bail until the decision of the point reserved, even although the offence is only a misdemeanor, and the prisoner was admitted to bail of right previously to the trial.

THE same prisoners were again indicted for assaulting the said Mary Ann Parsons, on several occasions between the 5th November, 1849, and the 4th January, 1850.

The indictment was as follows:—²

Devon, to wit: The jurors for our lady the queen, upon their oath, present, that Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, yeoman, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, on the 10th day of November, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one Mary Ann Parsons, in the peace of God and our lady the queen then and there being, did make an assault, and her the said Mary Ann Parsons, then and there, did beat and ill treat, with intent, in so doing, her the said Mary Ann Parsons to wound, and with intent, by such wounding, to her the said Mary Ann Parsons then and there feloniously to do some grievous bodily harm, to the great damage of the said

¹ 5 Cox, C. C. 11.

² The prisoners were also charged in a second indictment with a common assault; but being convicted on the former, that was not tried.

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Mary Ann Parsons, contrary to the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Robert Courtice Bird, late of the parish of Buckland Brewer, in the said county of Devon, yeoman, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, afterwards, to wit, on the 10th day of November, in the year of our Lord 1849, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon the said Mary Ann Parsons, in the peace of God and our lady the queen then and there being, did make another assault, and her the said Mary Ann Parsons did then and there beat, wound, and ill treat, and other wrongs to the said Mary Ann Parsons then and there, to the great damage of the said Mary Ann Parsons did, against the peace of our lady the queen, her crown and dignity.

Rowe and Karslake, for the prosecution.

Slade and E. W. Cox, for the prisoners.

The prisoners being called upon to plead,—

Slade. They will plead through me. I put in this plea of *autrefois acquit*.

The following was the plea, which was read by the clerk of the assize :—¹

“ And the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in their own proper persons, now come into court here, and having heard the said indictment read and the matters therein contained, say that they ought not to be put to answer the said indictment, they having been heretofore, in due manner of law, acquitted of the premises in and by the said indictment above specified and charged upon them; and for plea to the said indictment they say, that our said lady the queen ought not further to prosecute the said indictment against them, because they say that heretofore, to wit, at the Assizes and General Session of Oyer and Terminer and general delivery of the jail of our lady the queen, holden at the castle of Exeter, in and for the county of Devon, on Saturday, the 16th day of March, in the thirteenth year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, queen, defender of the faith, before Sir William Erle, knight, one of the justices of our lady the queen, assigned to hold pleas before the queen herself, Sir Thomas Noon Talford, knight, one of the justices of our lady the queen, of her Court of Common Pleas, and others, their fellows, justices of our lady the queen, assigned by letters patent of our said lady the queen under

¹ This plea was drawn by *Mr. Kingdon*, whose well-known abilities as a special pleader give it a peculiar value as a precedent.

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the great seal of the United Kingdom of Great Britain and Ireland, to them the said Sir William Erle, Sir Thomas Noon Talfourd, and others, their fellows, justices of our said lady the queen, and to any two or more of them directed, (of whom one of them, the said Sir William Erle and Sir Thomas Noon Talfourd, or of others in the said letters patent named, our said lady the queen willed to be one,) they the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, stood indicted, and were duly arraigned upon a certain indictment which charged them, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, by the names and descriptions of Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, laborer, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, for that they the said Robert Courtice Bird and the said Sarah, the said wife of the said Robert Courtice Bird, &c., [setting out the indictment in full, *ut ante*, p. 428.]

" And they, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, further say, that the said felony and murder so charged upon them in the said last-mentioned indictment, as aforesaid, included divers assaults therein supposed and alleged to have been made and committed by them, the said Robert Courtice Bird, and the said Sarah, the wife of the said Robert Courtice Bird, against the person of the said Mary Ann Parsons, in the said indictment named. And they, the said Robert Courtice Bird, and the said Sarah, the wife of the said Robert Courtice Bird, further say, that they did then and there respectively plead not guilty to the said last-mentioned indictment, and that they were thereupon then and there, in due form of law respectively, tried upon the said last-mentioned indictment by a jury of the said county then and there in due form of law summoned, impanelled and sworn to speak the truth of and concerning the premises in the said last-mentioned indictment mentioned, and to try the said issues so joined between our sovereign lady the queen and them the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively as aforesaid, and which said jury, upon their oaths, did then and there say that they, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively were not guilty of the premises in the said last-mentioned indictment specified and charged on them respectively as aforesaid, as they the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, by their pleas to the said last-mentioned indictment respectively alleged; whereupon it was then and there considered by the said last-mentioned court that the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, of the premises aforesaid, in the said last-mentioned indictment specified and charged on them respectively as aforesaid, should be discharged and go acquitted thereof without day, as by the record of the said proceedings now here appears. And they, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, further say, that they, the said Robert Courtice Bird, and the said Sarah, the

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said wife of the said Robert Courtice Bird, now here pleading, and the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in the indictment aforesaid named, and thereof acquitted as aforesaid, are respectively the same identical persons respectively, and not other or different persons respectively, and that the said Mary Ann Parsons, in the said last-mentioned indictment named, is the same identical Mary Ann Parsons as is named in the indictment to which they, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, are now here pleading; and that the said assaults so included in the said felony and murder so charged upon them, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in the said indictment in this plea mentioned in this behalf, and therein supposed and alleged to have been made and committed by them against the person of the said Mary Ann Parsons as aforesaid, are the same identical assaults, beatings, ill treatings, and woundings respectively as in the said indictment to which they, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, are now here pleading, are respectively supposed and alleged to have been made, done, given and committed respectively by them, the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively, and not other or different. Wherefore, they pray judgment of the court here, whether our said lady the queen will or ought further to prosecute, impeach, or charge them, on account of the premises, in the said indictment, to which they are now here pleading, contained and specified, and whether they ought to answer thereto respectively, and that they may be dismissed this court without delay."

Rowe. We shall take issue upon this plea, a copy of which has been very properly supplied to us by my friends, that we might give it due consideration, and mould our replication accordingly.

The replication was then put in. It was as follows:—

"That they were not acquitted of felony and murder, including the same identical assaults, beating, ill treating, and wounding, as alleged in the indictment, to which the said R. C. Bird and Sarah his wife have now pleaded *modo et forma*."

Slade. I object to this replication that it raises two distinct issues, one of law and one of fact. It does not put in issue the question raised by our plea, and which the jury are to try, whether these are the same identical assaults. At the best, it is an argumentative traverse; it does not deny the fact, but asserts something from which it is intended to be inferred that, as a matter of law, the fact is not so.

Rowe. We meet your plea in the only way in which it can be met, in order to raise the question that is to be tried, viz., whether the prisoners have been already in peril for the same offence.

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His LORDSHIP. If Mr. Slade objects to the replication, he should demur; that will raise the question whether it is good in law.

Issue was then joined.

The jury were then sworn to try whether the prisoners had been before acquitted of the offence with which they now stood charged.

Slade. The *onus* of proof upon this plea is upon the prisoners. Of course they could only make out a *prima facie* case. He should put in the record of the former trial and acquittal, and then he submitted that, the plea having averred that the assaults were the same identical assaults, it would be for the prosecution to prove that they were other and different assaults. It was impossible for him to anticipate what the prosecution was going to prove.

Rowe contended that this was insufficient to maintain the plea. The affirmation of the issue was upon the prisoners, who must show some evidence what were the assaults proved on the former trial, so as to identify them with those now to be tried.

His LORDSHIP. If I should hold it to be necessary to show that these assaults conducted to the death, the prisoners are bound to give some further evidence. The fact must be established by them that these assaults were the same as those for which they had been previously in peril.

Rowe. Clearly the prisoners must prove that the assaults now charged conducted to the death of the deceased, for it was only for such assaults that they had been in peril before. To support this proposition he cited *Reg. v. Crumpton*, 1 Car. & Mar. 597. *Reg. v. Connor*, 2 Car. & Kir. 518. *Reg. v. Phelps*, 1 Car. & Mar. 180. *Reg. v. M'Phane*, 1 Car. & Mar. 212. *Reg. v. Birch*, 2 Car. & Kir. 193; 1 Den. 185. *Reg. v. Greenwood*, 2 Car. & Kir. 339. *Reg. v. Barnett*, 2 Car. & Kir. 594. *Reg. v. Lewis*, 1 Car. & Kir. 419. *Reg. v. Gould*, 9 Car. & P. 364. *Reg. v. Gisson*, 2 Car. & Kir. 781. *Reg. v. Guttridges*, 9 Car. & P. 471. *Reg. v. Saint George*, 9 Car. & P. 483.

Karslake briefly followed on the same side.

Slade, commenting upon the various cases cited, contended that, under the statute, the jury might have found the prisoners guilty of assault, and, therefore, they had been in peril by nine of the cases cited on the other side; five were directly in favor of his view of it.

Cox referred to *Reg. v. Auty and others*, 2 Cox, Crim. Cas. 282; and also to *Reg. v. King and others*, 2 Cox, Crim. Cas. 95.¹

GURNEY, Q. C. The matter now in issue is, whether the defend-

¹ The argument is thus briefly stated here, because it will be found fully reported in the proceedings before the Court of Criminal Appeal.

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ants had been acquitted of a felony which included the assaults charged in the present indictment, and that being the case, it was incumbent upon the prisoners to establish the identity of the two offences. The question was, whether the putting in the former record was sufficient evidence upon which the jury may find that they were one and the same. The inference from the former record was this — that certain assaults, charged as being similar in their nature, were then charged as tending to the death of the deceased Mary Ann Parsons. Now the question was, whether the mere putting in of that record was sufficient to prove the plea. It was not, perhaps, the most regular mode of raising the question, but it seemed to him to be fair towards the prisoners, that they should have an opportunity, after hearing his opinion, to shape their case accordingly, and add to it if they were able. He was clearly of opinion, that the evidence which the prisoners' counsel had given was not such as a jury could satisfactorily act upon. It was clear, upon the authorities, that on the former trial the parties could not have been convicted of assaults which were independent of, and distinct from, the assault which produced death, unless they were themselves in some way conducive to death. It was not sufficient that it was charged in the indictment, but it must be shown in the evidence that these assaults were conducive to death. His lordship then proceeded to comment upon some of the cases cited, and said that in one it was held that the "assaults must be involved in and conducive to the charge." The same doctrine was held in the case of *Reg. v. Crumpton*, 1 Car. & Mar. 597, upon which doctrine Mr. Justice Patteson had acted. There was then the question, whether the law had been altered. It was laid down that, to convict of an assault under the statute of 7 Will. 4, & 1 Vict. c. 85, s. 11, the assault must be included in the charge upon the face of the indictment, and also be a part of the very act or transaction which the crown prosecutes as a felony by the indictment. His lordship then remarked that, unless the prisoners' counsel could go much further, it was his duty to tell the jury there was no evidence on which they could with safety act, so as to say that the plea was made out; in fact, the jury must be satisfied that the assaults charged in the present indictment were not distinct assaults wholly unconnected with the cause of death, but that they formed part of the very act prosecuted as a felony, and were conducive to the death.

Slade applied to have the point reserved, as it was a novel one.

His LORDSHIP said he would consider the application.

Mr. Justice Talfourd's notes upon the former trial for the murder were then read, for the purpose of showing the different beatings which had then been proved, and that they were then considered to have been conducive to the death.

After some discussion, in which Mr. Rowe contended that there was no case to go to the jury, which his lordship overruled, —

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Mr. Dennison, reporter for the Times, was called by Slade, and examined. He had not his short-hand notes of the trial, and was therefore interrogated from memory. He recollected that the surgeon, *Mr. Turner*, had stated that the child's death was caused by a blow or blows upon the head, and in this opinion *Mr. Edye* concurred.

Mr. Cox was also examined. He was junior counsel for the prisoners, and had taken notes of the trial, and, referring to them, stated that the assaults in the indictment were presented to the jury as parts of the charge; they were presented as links in the chain of evidence, and these several assaults were proved by the witnesses. He believed the assaults were identical with those now charged against the prisoners.

Rowe then called

Mr. C. C. Turner, surgeon, of Bideford, who stated that, on the 5th of January, he was applied to about the death of Mary Ann Parsons, and went to the prisoner's house. Examined the body of the deceased; it was stripped in his presence. Saw on the legs and thighs a great number of wounds, varying in extent and character, as if inflicted by a birch. On the arms and legs there were other wounds, and likewise on the hips and loins. On the head there was an extensive bruise from the forehead to the cheek on the left side. Witness made a *post mortem* examination. On the back part of the head there was an extensive bruise, and a considerable quantity of extravasated blood. The membrane of the brain was congested. Witness believed that the injury on the head was the cause of death. The gorging of the blood on the brain and extravasation of the blood are sufficient of themselves to cause death. Witness deemed that cause sufficient, and was therefore satisfied. He made an examination of other vital parts of the body, but found nothing there to account for the death. Could not give an opinion whether the other surface injuries would have caused death.

Cross examined. The powers of life were much reduced. There was no fracture of the skull. The body was very much emaciated. Witness could give no opinion as to whether the wounds and bruises on the body, independently of the blow, were sufficient to endanger life, regard being had to the reduced condition of the girl. Never knew a case of blood effusing itself on the brain after death, and, not believing that it could be so, he had arrived at the conclusion that the blow had caused the effusion. The external injuries tended to reduce the powers of life, and endangered life. The external wounds generally might have produced congestion of the brain, without the blow on the head. Did not think it was attributed to the blows on the body.

By his Lordship. The blow on the head was the cause of death, and nothing else in his opinion had contributed to it.

Mr. Edye, surgeon of Exeter, corroborated the evidence of the last witness generally.

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Rowe applied to put in the notes of the learned judge, with respect to the other evidence, to which *Slade* objected.

Rowe deemed it unnecessary to trouble the jury with any remarks upon the case.

Slade then addressed the jury for the prisoners.

HIS LORDSHIP summed up. The prisoners, Robert Courtice Bird, and Sarah, his wife, were indicted for having committed an assault upon the body of Mary Ann Parsons. To that charge they pleaded that they had already been tried and acquitted; and the question, therefore, for the jury was, not that which the learned counsel had stated, whether any of the assaults charged may have contributed to the death, but, Was there any one assault which did not contribute to the death? The counsel for the defence had stated that it was exceedingly hard that a party should be twice put upon his trial, and he had complained of the conduct of the learned counsel for the crown that, whereas on a former occasion it was contended that these assaults were the cause of death, or conduced to the death, they now say that they were not the cause of the death. But there were two parts to the former inquiry. The counsel for the crown contended that the assaults were the cause of death; the counsel for the prisoner, on the other hand, contended that they were not the cause: and having then succeeded, the prisoners were consequently acquitted. He could not, therefore, say that there was any hardship in their being tried for the offence now charged. The question which he should put to them was—supposing this to be so—were they satisfied that each one of the assaults proved to have been committed upon the body of the girl contributed to her death, and whether there was an assault distinct from, and which did not conduce to, the death. If there was one such, the prisoners had not been put in peril before for that one assault, and were, therefore, liable to be tried for it now. The evidence was, that, on an examination of the body, marks of various injuries, inflicted at different times, were found—these injuries being distinct from the blows on the head; and the medical men had stated that death was caused by a blow on the head. If that should be the opinion of the jury, they must find the issue in favor of the crown, because the prisoners had not been placed in peril before. It had been proved undoubtedly, by the medical men, that the vital powers were reduced in consequence of the injuries to the body; but though they could not say what might have been eventually the result of such lowering of the vital powers, they had been able to form a positive opinion on this particular matter—that the death of the child was alone caused by the injuries inflicted upon the head. If, therefore, the jury were satisfied upon that, it would be their duty to find for the crown; but if they should be of opinion that there was no other assault, other than and excepting that which had tended to the cause of death, then it would be their duty to return a verdict in favor of the prisoners.

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The jury, after half an hour's deliberation, returned a verdict for the crown.

On the following day his LORDSHIP said, addressing the counsel for the defence, that he was requested to reserve the point to which he had directed the jury's attention last evening for the Criminal Court of Appeal; and upon great consideration he had come to the determination that he would reserve that point. Looking, however, at the serious nature of the charge against the prisoners, and supposing that he was right in his ruling, according to the judgment of the court above, he did not consider that he could admit the prisoners to bail.

Slade. The prisoners have been on bail previously to meet this very charge of misdemeanor.

His LORDSHIP. But it is not a common misdemeanor—it is an assault, with intent to commit a felony.

Slade. But it is not an assault, my lord, laid as an aggravated one.

His LORDSHIP. The charge is for assaulting, with intent thereby to do grievous bodily harm.

Slade. The charge is not one of aggravated assault. Your lordship has no power to give the prisoners any greater punishment than that attached to a common assault.

His LORDSHIP was understood to dissent from this.

Slade. With the most perfect submission, my lord, I beg to say that with regard to the bail, if it should turn out that your lordship should be wrong in your ruling with respect to the point that has been reserved, the prisoners would have been improperly, or at least unlawfully, detained in prison for a long period. Now the question cannot be decided until after November, and the only object your lordship has, in refusing the bail, is to see that they are forthcoming at the proper time. After the last assizes, the prisoners were, by an order of government, arrested to take their trial upon the charge now laid against them, and yesterday they surrendered themselves. I cannot, therefore, my lord, see any reason for supposing that they would not surrender when again called upon.

His LORDSHIP replied that he pursued this course in order to secure the prisoners, supposing the conviction was decided to be right. He did not wish to inflict unnecessary punishment upon them, but it was necessary, for the ends of justice, that they should remain in prison until the technical objection was disposed of. It was a very serious offence with which they were charged, and it was necessary, therefore, that the prisoners should remain in custody, in order to secure

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their attendance at the proper time. He was very glad to have had the opportunity of consulting Mr. Justice Coleridge upon the case, and he had expressed his opinion, and authorized him to state, that he should not be justified in reserving the point for the decision of the Court of Appeal, unless the prisoners were detained in custody. His lordship, therefore, refused the application.

Slade suggested to his lordship, that if the prisoners should be convicted, the imprisonment which they would now undergo might be included as a part of their sentence. The sentence could not be passed until next March assizes.

His LORDSHIP. The imprisonment will most assuredly be taken into account.

Rowe then stated, in reply to his lordship, that he did not intend to proceed with the other indictments until after the reserved point had been determined upon by the court above.

COURT OF CRIMINAL APPEAL.

[Before LORD CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE and ALDERSON, BB., MAULE, PATTESON, COLERIDGE, WIGHTMAN, CRESSWELL, ERLE, WILLIAMS, and TALFOURD, JJ., and MARTIN, B.]

REGINA v. BIRD & Wife.¹

Murder and Manslaughter — Assault — Evidence — Autrefois acquit
— 1 Vict. c. 85, s. 11 — Practice.

Prisoners were indicted for the murder and manslaughter of A, *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal:—

Held, by all the judges, that the judge had rightly so directed the jury.

By stat. 7 Will. 4, and 1 Vict. c. 85, s. 11, it is enacted, "That on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and where such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years:—"

Held, by Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erle, Williams, and Talfourd, JJ., that under this provision of the statute, the prisoners could not have been lawfully convicted of assault under the circumstances above named, inasmuch as the assault contemplated by the statute must be such as was a part of the very act and transaction prosecuted, and also conducted to the death.

¹ 5 Cox, C. C. 20. 15 Jur. 193. 20 Law J. Rep. (N. S.) M. C. 70.

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Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin, B., *dissentientibus*.

The prisoners, having been subsequently indicted for those assaults, pleaded *autrefois acquit*, and the judge having directed the jury, upon the trial of this plea, to the effect that if they were satisfied there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown:—

Held, by Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, Patteson, and Wightman, JJ., and Martin, B., that such direction was not strictly right, inasmuch as the issue raised by the plea was, whether the prisoners had been before tried for the same offence; but, nevertheless, held by Patteson and Wightman, JJ., that the misdirection was not sufficient to invalidate the verdict:—

Held, by Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin, B., that the conviction was bad also by reason of the misdirection.

Where the prisoners had joined in their plea at the trial, and were represented by counsel appearing for them jointly, and not separately:—

Held, that according to the practice of the Court of Criminal Appeal, they are not entitled to appear by separate counsel at the hearing of the appeal.

For affirming the conviction, Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erie, Williams, and Talfourd, JJ.

For holding the conviction bad, Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin, B.

[*Before* POLLOCK, C. B., WIGHTMAN, WILLIAMS, and TALFOURD, JJ., and MARTIN, B.]

November, 1850, and February, 1851.

[It has been deemed desirable to report shortly the proceedings at the first hearing of the appeal before the five judges who constituted the court, because many arguments were then used which were only briefly, if at all, adverted to in the subsequent argument before the full court, and as they had been widely published and much canvassed, they might be supposed to have had some influence upon the subsequent deliberations. At all events, they may be useful for reference in other questions that may arise hereafter upon the law of *autrefois acquit*. An endeavor is made to avoid repetition.]

Cockburn, (Solicitor General,) Rowe, Q. C., and Karslake appeared for the prosecution.

Slade, for prisoner R. C. Bird.

E. W. Cox, for prisoner Sarah Bird.

The following was the case:—

The prisoners were indicted for having, on the 10th November, 1849, assaulted Mary Ann Parsons with intent to wound, and with intent by such wounding to do her grievous bodily harm.

The prisoners pleaded that they had been before acquitted of the offence charged.

The plea set out an indictment for murder, the 1st count of which charged murder of Mary Ann Parsons by striking, on the 5th November, 1849, with a stick, on the head, chest, shoulders, back, arms,

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legs, and thighs, causing divers mortal bruises, of which she died on the 4th of January, 1850. The 2d count alleged the mortal bruises to have been caused by divers beatings between 5th November and 1st of January. The 3d count alleged beatings on 5th November, 1st December, and 1st January, and on divers other days between 5th November and 1st January. The 4th count alleged the mortal bruises to have been caused by blows inflicted with a scourge made of leather thongs. The 5th count alleged the mortal bruises to have been caused by casting and throwing her against the ground on the 1st of January, 1850. The 6th count alleged the mortal bruises to have been caused by throwing her on the ground, and then kicking and beating her, on the 1st of January, 1850.

It then alleged that the indictment included divers assaults against Mary Ann Parsons, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment were the same as those charged in the present indictment. The replication to this plea averred, —

That the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment.

The form of record was put in, and it was proved that, on the former trial, evidence had been given of different assaults committed by the prisoners upon the deceased through the months of November and December, one on the 5th of November with a stick upon the arm and neck, one at the end of November or beginning of December with a stick across the shoulders, another with a furze bush about the 11th of December, and it was also shown that some time before the death, but the precise time was not fixed, the deceased had been flogged with a birch on the legs and thighs.

The counsel for the prosecution, in opening the case to the jury on the former trial, had opened these different assaults as conducing to the death, but stated that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners.

It being proved, however, on that trial, as it also was on this, that the death which took place on the 4th of January was caused exclusively by one particular blow on the head, inflicted shortly before the death of the deceased, and there being no evidence to show that that blow had been struck by either of the prisoners, they were acquitted.

It was not shown before me that there were any other assaults committed but those which had been given in evidence on the former trial.

Under these circumstances, the following question of law arose: whether the general acquittal pronounced at the former trial could operate as a bar to a prosecution for each and every of the assaults so given in evidence.

After telling the jury that the burden of proof lay upon the prisoners, who were bound to establish the truth of their plea, I directed them that if they were satisfied that there were several distinct and

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independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown.

The jury thereupon found a verdict for the crown; but a doubt existing in my mind whether I was right in my direction to the jury, I thought it fitting to state the foregoing circumstances, and the question of law arising upon them for the opinion of the justices of either bench and the barons of the Exchequer under the act of the 11 & 12 Vict., intituled, *An Act for the further Amendment of the Criminal Law*, and the case before stated is the case upon which such opinion is required.

I did not pass judgment on the prisoners, and they still remain in prison.
(Signed) RUSSELL GURNEY.

Slade, having read the case, said that, on the part of the male prisoner, R. C. Bird, he had now to submit to the court that he was entitled to an acquittal upon the plea of *autrefois acquit*, because he had been already in peril for the same offence. The identity in fact of the assaults proved on the first indictment with those charged on the second indictment was admitted; but then it was said that an acquittal for a felony could not be pleaded in bar to an indictment for a misdemeanor. That was so; but the statute 1 Vict. c. 85, s. 11, had made a special provision for cases in which the felony charged included an assault, empowering the jury in such cases to acquit of the felony, and find the prisoner guilty of assault, if the evidence should warrant such finding. The question, then, which was now submitted to the court, was this: Were the prisoners in peril of a conviction for these assaults at their trial upon the first indictment? He contended they were so, because by that statute they might then have been lawfully convicted of assault. The crown, on the other hand, asserted that the statute did not extend to permit of a conviction for these particular assaults, although they were put in evidence against the prisoners at the first trial; that they could not then have been legally convicted of them, and, therefore, not having been in peril upon these particular charges, they are not entitled to *autrefois acquit*. The question, therefore, which he should now submit to the court turned entirely upon the construction of the statute, and he admitted that there had been a difference of opinion among the judges upon it, but he should show that the preponderance of authority was very greatly indeed in favor of the construction which he maintained to be the right one. It would be material to ascertain whether the assaults proved were part of the very act and transaction which the crown prosecuted as a felony. Of that there could be no doubt. It was stated in the case that the counsel for the crown relied upon those very assaults. Towards the close of that first trial, the medical men who were called put an end to the case, so far as the felony was concerned, by stating that the death was caused by a blow inflicted on the skull some time before the death. There was no evidence whatever to connect either of the prisoners with the infliction of that blow, and, as he thought, with the unanimous concurrence of every member of the bar who was

present, his lordship directed an acquittal. Upon that occasion little or no consideration was given to the question whether the prisoners could be convicted of an assault. There was no argument upon it, Mr. Rowe suggested that they might be guilty of an assault; but the point came on him not quite so much by surprise as it did upon his friend. He cited the case of *Reg. v. Crumpton*. The learned judge adopted that view, and said there could be no conviction for an assault. At the last Summer assizes the prisoners were indicted for the assaults which were the subject of the present inquiry. No other assaults were proved to have been committed by the prisoners except those that were opened to the jury by the counsel for the prosecution and proved on the former trial. The identity of the assaults was clear. It was, therefore, submitted that the prisoners were entitled to an acquittal; but the learned judge (Mr. Gurney) adopted the very words used by Mr. Justice Patteson in *Reg. v. Crumpton*, 1 C. & M. 597, and put it to the jury that, unless they were satisfied that there were several distinct and independent assaults, some of which did not conduce to the death of the deceased, it would be their duty to find for the crown. Two questions arose upon this: first, whether, upon the facts stated, the prisoners were not entitled to be acquitted upon proof of the identity of the assaults; and secondly, whether the learned judge did not misdirect the jury in stating that they must find a verdict for the crown unless they were satisfied there were several distinct and independent assaults, none of which conduced to the death of the deceased. To come within the statute, it must be a felony, which included a charge of assault. There had been considerable difficulty in putting a construction upon the words of the statute, much of which might have arisen from Mr. Greaves's note to "Russell on Crimes," which note had not met with the sanction of the learned judge, Baron Parke saying that, if that note was to be considered as law, the statute would be frittered away. He would bring forward every case upon the point, and with the exception of that of *Reg. v. Crumpton*, no one case supported the view of the learned judge. In 1842 the decision in the *Reg. v. Crumpton* was given, and in 1846 the same judge, (Mr. Justice Patteson,) in assisting a judge who was trying a prisoner, when the same identical question arose, recommended a verdict to be found for the assault, and reserved the question for the fifteen judges, and they held that a verdict for assault could be found.

[The learned counsel then cited in succession each of the cases which had been decided upon the construction of the statute, commenting upon each as he proceeded. As the same cases were cited on the subsequent argument before the full court with a still more ample and able commentary, it will be unnecessary to repeat them here; but the reader is referred to the after proceedings for a full report of them. He concluded his lengthened review and argument thus:—]

It will be seen from these cases that, with two exceptions only, the whole current of the decisions had been to adopt the construction of the statute for which he was contending, viz., that the assault need not conduce to the death, although it must be part of the very act or transaction which the crown was prosecuting, and the only test of,

that can be, if it was included in the indictment and produced in evidence. In this case these very assaults had beyond doubt been charged in the indictment; they had been put in evidence for the purpose of procuring a conviction, and they were not laid aside until it was found that they did not support the charge they were adduced to establish. Having been so charged and so put in evidence, they were as a part of the very act or transaction *prosecuted*; although not proved, they were clearly within the words of the statute, and the construction put upon it in *Reg. v. Birch*; the prisoners might have been found guilty by virtue of the statute of those assaults, and they are entitled to their plea of *autrefois acquit*, now that those selfsame assaults are prosecuted again.

E. W. Cox, for the prisoner Sarah Bird, said that he should submit to the court altogether a different line of argument. He adopted all the arguments of Mr. Slade, but to avoid repetition he would confine himself to another view of the question. He claimed an acquittal also by virtue of the general law of *autrefois acquit*. It was an ancient constitutional law, designed for the protection of the subject, and, like all such laws, to be construed liberally in favor of life and liberty. Having looked back into the earliest authorities upon that law, he was satisfied that it was not dependent upon any technicalities or refined constructions of the words of a statute, but that it was entirely a question of *fact*, to be tried by a jury and to be submitted to them as a question of *fact*. The principle of the law is, that no man should be put in peril twice for the same offence, and that phrase does not mean the same crime in legal definition, but the same *act done*, which is charged as crime, whatever the name affixed to it by the law. Thus, an acquittal for manslaughter can be pleaded in bar to an indictment for murder, and *vice versa*. *Holcroft's Case*, 2 Hale. Why? Because the prisoner has been already tried for the same *act done*, although they are different offences in law. So, an acquittal on an indictment for a burglary *with violence* may be pleaded in bar to an indictment for murder resulting from that violence. *Reg. v. Gould*, 9 Car. & P. 364. And, for the same reason, the act done has been already investigated, and the prisoner having been charged upon it, and put to his defence upon it, has been in peril for that act, although the offences are so different. What, then, in *autrefois acquit*, is the question at issue, which the jury are to try? Nothing more than this, ay or nay, is the act that is charged as a crime in the second indictment the same identical act which was charged as a crime in the first indictment, and for which he was then tried. If it be proved that the act now prosecuted *was* in truth *charged* in the first indictment, and there is a general acquittal upon that indictment, then is the prisoner acquitted, not only of every thing that *was* proved under that indictment, but also of every thing that *might have* been proved under it, even although it had not been put in evidence at all. *Reg. v. Sheen*, 2 Car. & P. 634.

This is the law of *autrefois acquit*. It is wholly a question of *fact* for the jury, and the manner of trying it will at once show what is

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the single question that upon such a plea is to be left to the jury. Applying it to the case now under consideration, and it will be seen how wrong was the direction of the learned judge, and also how entirely the case falls within the limits of the law. At the first trial, the prisoners were charged, in various counts, with feloniously causing the death of their servant girl — among the other alleged causes of death was a series of beatings extending from the 1st of November to the day before her death. Clearly, then, *the act* of divers beatings was charged in the indictment. Beatings on the days named were put in evidence for the purpose of supporting that charge of murder by those beatings. It turned out, according to the opinion of a medical man, that those beatings did not in fact cause her death, and the prisoners were, therefore, acquitted. Had they not been in peril upon that charge for that very *act*? Might not the jury, if they had pleased, have disbelieved the surgeon, and come to the conclusion that those beatings *did* conduce to the death, and were not the prisoners, therefore, in peril upon them? Suppose, as was very possible, that three or four surgeons had been called instead of one, and they had differed in opinion as to whether the beatings did or did not occasion death; surely, in such case, the jury would have been obliged to form an opinion upon the contradictory testimony, and if then they had acquitted, could it have been said that the prisoners were not in peril for those assaults, seeing that their lives depended upon the balance of opinion in the jury's minds? And is there any difference in fact whether there was one medical man or four? The jury were not bound by his opinion. They might, if they had pleased, lawfully have convicted upon their own view of the case, on their own belief as to the cause of death. If a surgeon or an amateur of medicine had been upon the jury, he might have differed from the opinion of the witness, and persuaded his fellows that Mr. Turner was wrong. If a lawyer had been upon the jury, he might have told them as the law is, that if those beatings had weakened her frame so that they had shortened her life by a single hour, they would have conducted to the death. These suppositions are put to show that, in truth and fact, the prisoners were in peril upon that first indictment; that the jury might have legally convicted them of murder or manslaughter for those very assaults; that it was altogether a question of *evidence* which the jury alone had a right to determine, which they did determine, which they might, if they had pleased, have determined otherwise, and which, if they *had* so determined, would have left the prisoners *lawfully* convicted, with no other remedy than the queen's pardon in case the judge was not satisfied that the evidence justified the verdict. If, then, they might lawfully have been convicted of murder or manslaughter by those assaults, have they not been tried for them, and in peril for them, and is not an acquittal a discharge from every thing charged in that indictment? Suppose the case reversed: that they had been convicted of the murder or the manslaughter, and then they had been indicted again for those assaults. What would have been the argument? Your lordships would instantly have felt that in truth and fact they had been already tried and punished for them.

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But if those assaults did not, as the prosecution asserts, conduce to the death, then they would not merge in the felony, and to a subsequent separate indictment for each one of them the prisoners, according to the argument of the prosecution, would be liable to another conviction and punishment. Common sense at once revolts from this conclusion, when thus put; but the case is not altered in the least when the plea is a former acquittal, for where *autrefois convict* would lie, *autrefois acquit* may be maintained. The one is the test of the other. When the act charged in the first indictment is again prosecuted, we plead *autrefois acquit*; that is, we say that the assaults now charged are the same identical assaults as those for which we have been already tried and acquitted. That is our plea. The proper replication to this is, that they are not the same assaults, but other and different assaults. But the prosecution replied with a pleading obviously bad, and which was not an answer to our plea, and did not raise the issue. The only question really to be tried in *autrefois acquit* is, whether the offence laid in the second indictment is the same offence as that charged in the first. The proof is on prisoners. We proved it by the only means in our power, producing the first indictment to show what was the offence charged, calling witnesses to show what was the offence proved, and then, having made a *prima facie* case, it was for the prosecution to prove that the offence it then charged was not the same offence as had been previously tried. But in this case the prosecution attempted to prove no other assault than that which it proved on the first trial. Then the question raised by our plea being purely the question of *fact*, ay or nay, were they the same identical assaults, that question, and that only, should have been put to the jury. But it was not put at all; the jury were told to consider only whether those assaults had conduced to the death, a point that was not in issue upon the pleadings, and was not the question they were impanelled to try, so that upon this wrong direction, also, the prisoners are entitled to an acquittal.

But, then, it is said by the prosecution, this is an indictment for a misdemeanor, and you cannot plead an acquittal for a felony in bar to it. He was not sure of that: there is no authority for such a position; and he should be prepared to contend, that if the very same *act* had been once made the subject of a criminal charge, it could not be again charged merely by altering its name. But that point needs not be discussed here. The statute had removed that difficulty; it had enabled the jury to convict of assault, and therefore had in fact subjected the prisoner to peril of a conviction for a misdemeanor. Now, what was the plain reading of that statute, apart from judicial doubts? Put into popular language, it was obviously this, that wherever the felony charged, that is to say, for which the prisoner was being tried, in its nature included an assault, the jury might, if the evidence failed to establish the felony, but only established an assault, acquit of the felony and convict of assault. This was the common-sense meaning of the words, and the present case precisely applied to them. Here the charge was an offence which in itself included an assault, the evidence failed to establish the felony, but it

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established the assault, and therefore the jury might have found the prisoners guilty of assault by virtue of the statute. But even if some more obscure meaning could be put upon the words of the statute, the prisoners were yet entitled to their *autrefois acquit*, because the statute has given it to *the jury* as a question of *fact*, not to the court as a question of *law*, the power to determine whether the evidence warranted a finding of guilty of assault; and inasmuch as the power was vested in the jury as a question of fact, and they *might* have used it, if they had pleased to do so, the prisoners had been in peril under the statute, however construed. In conclusion, he called upon the court to put the most liberal construction upon the law of *autrefois acquit*, as upon all law, for the protection and liberty of the subject, and to say that in truth and fact the prisoners had been tried before for the very same act and offence for which they were now convicted.

The *Solicitor General*, (*Cockburn*.) (with whom were *Rowe*, Q. C., and *Karslake*.) for the crown. The importance of this case had not been exaggerated. It involved large questions of criminal law, and it had been very fairly and ably argued on the other side. The crown was only desirous that the true state of the law should be ascertained, and he would begin by observing that the law of *autrefois acquit* was not to be construed so liberally as his friend had contended; but, rather, it was to be construed strictly and reduced to the narrowest limits, as a law rather conducing to the escape of guilt than the protection of innocence, insomuch that many thinking men had come to question whether it ought to be retained at all in our criminal jurisprudence. The entire principle and practice of that law would be found in the case of *Reg. v. Vandercomb*, 1 Leach, and it was there laid down that the test whether the plea could be maintained was this, viz., whether the evidence produced to support the second indictment would have sufficed to procure a legal conviction upon the facts. Starting with that proposition, the question resolved itself into this, whether the prisoners, upon the facts, could have been convicted upon the first indictment; and there could be no doubt that they could not have been convicted of murder. The facts were these: These two persons being charged with the murder of an apprentice girl, it appeared that a series of cruelty and ill usage had been inflicted upon her by the prisoners, but it appeared it was not these beatings and ill usages which had occasioned the death, the surgeons negating that, and proving the death to be attributed to a particular blow inflicted a few days before the death. There was evidence to show that the two prisoners had inflicted beatings which the surgeons disconnected with the cause of the death. There was no evidence to show by whom the last fatal blow had been inflicted.

MARTIN, B. There was no evidence that either of the prisoners gave the fatal blow.

The *Solicitor General*. There was no evidence to show whether

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the blow had been inflicted by either of them. Under these circumstances, therefore, it was impossible either of the prisoners could have been convicted. The matter had caused considerable sensation, and he might say there was not upon this a dissentient voice in the whole profession.

POLLOCK, C. B., was glad to hear this observation, because it was desirable that the administration of justice should be free from reproach, and that there should be no failure of justice. In the case of the Mannings he had felt himself obliged to tell the jury, and he did tell them, that if they upon deliberation thought that a murder had been committed beyond a doubt, and committed by either of the prisoners, but after the utmost deliberation they thought the other was innocent, and could not fix the guilt distinctly upon either, they would be bound to acquit both. That was clearly the law of the land.

The *Solicitor General* hoped that it would not be deemed impertinent if, after the discussion which had taken place with reference to this memorable trial, he expressed not only his own profound conviction, but the unanimous conviction of every lawyer in Westminster Hall. The authorities had been so much commented upon that he would only take a rapid review of them. He admitted that there was considerable conflict in the authorities, and he must have recourse to principle in order that the court might lay down some rule which might be considered as authority. The whole question turned on the effect of the statute 7 Will. 4, and 1 Vict. c. 85. Prior to that statute a person charged with felony could not be convicted of a misdemeanor involved in that felony; but the statute had provided for such a case. It frequently happened that persons charged with felony were acquitted, the proof of the felony failing, although it might be clear that they were guilty of grievous assaults. The object of the statute was, in case of a failure to make out the charge of felony, to enable the jury to convict the party of an assault. Some cases seemed to have gone to this extent, that if a felony was charged and a misdemeanor of assault proved, although that assault should not be connected with the felony, still the party might be convicted of the assault. Such had been the opinion of Baron Gurney in *Reg. v. Pool*, 9 Car. & P. 728. Still he did not think, when the court reviewed the cases, they would feel bound by the opinion thrown out in that case, which certainly had been overruled. His proposition was this, that in order that a conviction might take place, the assault must be one connected with the circumstances relied upon to make out the felony, in this case with the death, in others with the robbery or rape, &c. There must be something connected with the main felony itself, and although one learned judge might act upon one principle and another upon another, they would find that in all the assault was immediately connected with the chief transaction which was charged as the felony and inseparable from it, and that in all the cases some other ingredient only was wanted to make out the felony. In one of the cases his friend had relied upon, *Reg. v. Ellis*, 8 Car. & P. 654, the parties were charged

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with robbery, but the particular prisoner was not seen to have committed the robbery, but was seen to commit an assault. He was seen in the course of the transaction which led to the robbery: the robbery was part and parcel of the same transaction, connected in point of time, connected in point of immediate sequence; but there was a failure of proof of the robbery. It was said that it was competent for the jury to convict of the assault; but that was the judgment of a single judge, and very shortly afterwards the doctrine was not upheld. In the case of *Reg. v. Gould*, 9 C. & P. 364, there had been no argument. It was not because the statute made it competent to the jury to convict a man of the misdemeanor that it was necessary he should be convicted, and by that means escape the higher penalty which would attach to the minor felony involved in the matter. As to the case of *Reg. v. Archer*, 2 Moo. C. C. 283, the question was, whether upon a joint indictment one party could be convicted of a felony and the other of a misdemeanor. It was held they could. Then in *Reg. v. Guttridges*, 9 Car. & P. 471, Baron Parke said that in an indictment for felony they ought not to convict of a complete, independent, and distinct assault, but only of such an assault as was connected with the felony charged. In the case of *Reg. v. St. George*, 9 C. & P. 483, for attempting to fire a pistol, with intent, &c., the question was, whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol? Baron Parke said his idea was that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol. They then came to the case which underwent the consideration of the fifteen judges, *Reg. v. Phelps*, 1 Car. & Mar. 180, an indictment for murder. Phelps had struck the deceased with his fist several times, but then went away, and was not present when the fatal blow was struck. The jury found Phelps guilty of the assault, but acquitted the others altogether. The point was reserved, and the judges held that the conviction was wrong, because the blows were disconnected with the cause of death. How was it possible to distinguish that case from the present? Then they came to the case which had been relied upon by his friends at the trial for the murder; *Reg. v. Crumpton*, 1 Car. & Mar. 597. Then there was the case of *Reg. v. Boden*, 1 Car. & K. 395, where Baron Parke had left the assault to the jury; but upon conviction gave so slight a punishment that the point was not reserved. It was monstrous to suppose that where a party was acquitted of a felony, he might be convicted of an assault which was totally disconnected from the felony. It was not because a felony involved an assault, that therefore you might convict a man of any assault whatever. *Reg. v. Birch*, 1 Den. C. C. 185; 2 Cox, C. C. 22, was a robbery. The prisoner was acquitted of the robbery and convicted of the assault, but it was clear that the main point there was the intention to rob. It was considered as one and the same transaction. The jury negatived the intent. The greatest consideration was given to Mr. Greaves's note to Russell, who had contended that it was necessary that the intent to commit the felony should be made out in order to warrant the conviction for the assault. The contention had been as to the correctness of that

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note. The judges held that the jury had properly convicted of the assault. The next case was that of *Reg. v. Greenwood*, 2 C. & K. 339, tried before Mr. Justice Wightman; a robbery with violence. There was no proof of the robbery, but only of an assault. Mr. Justice Wightman consulted Mr. Justice Cresswell, and then said the prisoner could not be found guilty of the assault unless it appeared that it was committed in the progress of something which, when completed, would be with the intent of committing a felony; therefore, unless the jury were satisfied the prisoner intended to rob at the time he assailed the prosecutor, he could not be convicted. *Reg. v. Connor* was directly in point. An acquittal was directed by the chief baron, through Serjeant Murphy, because the death was not connected with the assault. In *Reg. v. Barnett*, 2 Car. & K. 594, Mr. Justice Cresswell said the jury ought not to convict of an assault which was unconnected with the robbery. In all the cases there was not one in which the party had been convicted of an assault which was unconnected with the principal transaction charged. In *Reg. v. King*, 2 Cox, C. C. 95, Lord Denman had held differently from the other judges in the other cases.

WILLIAMS, J. In the case of *Reg. v. Auty*, 2 Cox, C. C. 282, he had concurred with Baron Platt, and he believed the distinction in which he concurred was this: If the prisoner was found in a transaction of killing by violence, and the evidence for the crown showed that there was such a transaction, but that the prisoner was not one who was implicated, then he must be acquitted generally, although he may have been guilty of the assault upon the deceased, because then the assault was not a part of the imputed transaction; but if the evidence for the crown failed to show that there was any such transaction as a death by violence, but that it was attributable to natural causes, but also that there was a transaction amounting to an assault, in which the prisoner was implicated, and nothing more, then the jury might convict of the assault, because the only transaction charged was proved, and the prisoner was shown to have been guilty of it.

The *Solicitor General*. There was a distinction in this case. Death there appeared to have proceeded from natural causes, and there was nothing beyond the assault. The charge terminated with the assault, and could be carried no farther. But in the present case they had the fact of a death by violence occasioned by somebody else; and it involved this question, whether if a man was indicted for murder, and it appeared that, instead of the assault he committed having occasioned the death that somebody else was guilty of the murder, you could find the prisoner guilty of the assault.

TALFOURD, J. Suppose the order of proof had been inverted, and the medical men had been first called and proved the death to have been occasioned in some other way, then it had been conceded by the prosecution that they could not bring it home to the prisoners, the evidence of the assault would have been rejected.

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The *Solicitor General*. Of course the judge would have stopped the case. In *Reg. v. Rooke*, it was proved that the ill treatment had taken place many months before, but there was no evidence to connect the death with the violence, and it was proved that the deceased had died from natural causes; still Baron Platt held that the prisoners might be convicted of an assault. He was desirous of treating every decision with the greatest possible respect; but he owned he could not understand the principle upon which that decision was come to, because you might convict a man of an assault upon an indictment charging another offence, if it turned out that at some time or other the man had committed an assault. If it was wanted to show the mind and disposition of the accused towards the deceased — to show a grudge of old standing, and an assault was proved, but the prosecution failed to prove that the accused occasioned the death, could any one say that the jury could convict the party of an assault? What limitation would the court apply to the statute? Was not the true principle to be collected from all the cases — that a party might be convicted of an assault when the indictment involved a charge of violence, if the assault was immediately connected with the principal felony with which the prisoner was charged, so that, from a failure of proof of any of the circumstances to constitute the offence, the parties in one and the same transaction might be convicted of an assault? It was quite clear that the acts charged in this second indictment did not occasion the death, and, therefore, these parties were not before put in peril. The prisoners at the first trial had insisted that they could not be convicted of the murder because the assaults were not the cause of death, but were disconnected with it. The statute said that, in cases of felony, where the evidence did not warrant a conviction for the felony, the jury might convict of an assault. But was it obligatory upon the jury to convict of the assault? or was it incumbent on the judge to direct the jury to convict of the assault? He apprehended not.

WILLIAMS, J. Suppose an indictment for murder, and that the judge omitted to instruct the jury that the prisoner might be convicted of manslaughter, could he be afterwards indicted for manslaughter?

The *Solicitor General*. The charge of manslaughter was involved in that of murder.

WILLIAMS, J. A man is in jeopardy for any part of the offence charged in the indictment.

The *Solicitor General*. The act of Parliament says, that if a party be charged with a felony, and the evidence fails to prove it, but is sufficient to warrant a conviction for assault, he might be convicted of assault. Did that apply to a case where a party was charged with a series of assaults? If the jury could only convict of one assault, the prisoners would go free as to all the others. In the case of *Reg. v. Vandercomb*, 1 Leach, for burglary and stealing, it was found that they could not convict the prisoner of stealing, and he was acquitted. They then indicted him for the burglary with intent to

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steal. He pleaded *autrefois acquit*. The judge said it was not the same offence; he had not been in peril for the same offence; he could not have been convicted before upon the same evidence. He submitted that the learned judge was right in his direction, and that the conviction was good.

Slade, in reply. The prisoner had stood his trial upon every thing contained in the indictment; if he could have been convicted of an assault, he had been acquitted of it upon the first indictment. He admitted that the jury could not convict of an assault wholly independent of the felony, but he contended that these assaults were completely mixed up with it. This court was now called upon to overrule the decisions of Mr. Justice Allan Park, Baron Parke, Justices Cresswell, Coltman, and Coleridge, Lord Denman, Chief Justice Tindal, and Baron Platt; and for what purpose? Not for the purpose of reconciling conflicting opinions — not for the purpose of settling any great principle of law; but for the purpose of giving a different construction to the words of an act of Parliament to that which had prevailed ever since that act had passed. And why? For the purpose of punishing two miserable individuals who had already been sufficiently punished, who had been held up to public execration by the press, which in doing so had not spared the ermine of one of their lordships. For such a purpose this court was asked to overrule all these decisions. If the case had been argued before Mr. Justice Talfourd at the trial, and he had left the question of assault to the jury, and they had found the prisoners guilty, with what chance of success could they have come to this court with all these authorities against them except the solitary one of *Reg. v. Crumpton*?

WILLIAMS, J., would put the case. Supposing a woman indicted for murder of a bastard child, where the jury were at liberty to acquit of the murder and find guilty of the concealment, was the judge bound to leave the concealment to the jury, or could she be indicted for the concealment afterwards?

Slade. It was difficult for him to say what the judge was bound to do. If the learned judge asked whether it was the judge's duty, he should say it was. The law assumed that every judge knew the law. So far as the peril of the prisoner went, it was not said that the judge had any discretion. The judge was not named in this act of Parliament, but only the jury.

WILLIAMS, J. But is it his duty to leave it to the jury in all such cases?

Slade. I am at his mercy. If a man with a drawn sword, and I am naked, stands before me, I am to expect he will run me through.

POLLOCK, C. B. But if he does not wish to run you through. Is it not the duty of the judge?

Slade. Yes; I think it is.

MARTIN, B. Suppose the learned judge had left the question of

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assault to the jury, and they had found the prisoners guilty of the assault, could they afterwards have been indicted for an assault which did not conduce to the death?

Slade. Not if it was included in that indictment; by an averment they could get out of it.

MARTIN, B. Suppose that beating in the morning and beating in the afternoon caused death; the indictment included both beatings; the jury acquitted; the beating in the morning did not conduce to the death, but the beating in the afternoon did; could he be tried a second time for the beating in the morning?

Slade. Certainly not. That is my case.

E. W. Cox, for the female prisoner, replied. His client had been in peril before. The solicitor general had said, here you have been indicted before, but you could not have been lawfully convicted; therefore, you were not in peril. But the answer was, that the jury *might* have convicted if the evidence would have justified it, and they did not convict only because they were of opinion that the evidence did not establish the charge. Still they *might* have done so if they had pleased; it would have been a lawful conviction, and only the royal pardon would have relieved from the consequences. Therefore, they had been in peril. All these assaults were included in the first indictment; therefore, the prisoners then stood in peril upon the very charges which were now brought against them. The judge was bound to put those assaults to the jury, and it was for the jury to say whether or not they believed the evidence of the medical witness as to whether these acts did or did not conduce to the death, and it was at the option of the jury to believe that evidence or not. They had a full right to disbelieve the surgeon, and to act upon their own view of the cause of death, and to hold that those assaults did conduce to the death. Besides, what right has this court to assume that the jury acquitted because of the surgeon's evidence? The reasons for their verdict are not stated, and it may have been that they did not consider the assaults proved, or that they were justifiable assaults, or any capricious reason. The court cannot sit in judgment upon the verdict of the jury upon a question *of fact*.

TALFOURD, J. The grand jury had not found the bill for the assaults, they had found the bill for murder. The question was, whether these assaults were included in the first indictment.

E. W. Cox. They were not only expressly charged in the indictment, but actually put in evidence in order to sustain the charge. Upon that point there can be no doubt.

POLLOCK, C. B., said the court would take time to consider the case.

The court having intimated that there was a difference of opinion among the judges, and that it was desired that the question should be re-argued before all the judges, accordingly they appointed for that purpose Saturday, January 26, 1851.

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[Before LORD CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE and MAULE, BB., PATTESON and COLERIDGE, JJ., ALDERSON, B., WIGHTMAN, CRESSWELL, EARLE, WILLIAMS and TALFOURD, JJ., and MARTIN, B.]

SLADE, having read the case, (*ante*, p. 428,) said, that he should now submit two propositions, and if he succeeded in either of them, he should be entitled to the judgment of the court. The first was, that the true issue raised by the plea of *autrefois acquit* was not presented to the jury by the learned commissioner who tried that issue, but that he did in fact direct the jury to found their verdict upon another and altogether different issue, which was not raised by the pleadings, and that if the jury had been properly directed upon the issue as really raised by the plea, they must have been entitled to an acquittal. The other proposition which he should have the honor to submit was that which he had already argued at, he feared, tedious length, before five of their lordships in the Exchequer chamber, namely, that by reason of the provisions of the stat. 1 Vict. c. 85, s. 11, the prisoners might have been convicted of assault for the assaults which were then charged and put in evidence against them, and therefore were entitled to their plea of *autrefois acquit* when the same identical assaults were again sought to be charged and proved under a second indictment.

The prisoners were tried at the Spring assizes for Devon for the murder of Mary Ann Parsons. The cause of death was stated in as many as six counts. He admitted that it was not necessary to prove all the assaults precisely as laid, nor was it necessary to prove the time at which it was stated they had taken place, but it was material to consider the mode in which the prosecutor had stated his charge, for the court would then be able to collect that these assaults were part of the very act and transaction which the crown had prosecuted as a felony by the indictment. There could be no doubt that it was so, for it was not only so charged, but it was opened by the counsel for the crown that they should rely upon the assaults as tending to prove the charge of murder. At the trial for murder these assaults were proved, and three were relied upon. The first was proved to have taken place on the 5th of November; the second at the end of November, or beginning of December; and the third on the 11th of December. No other assault was proved. On the second trial no other assaults were proved. The first trial proceeded at very great length, until it was necessary to call the medical evidence to prove the cause of death. The medical men swore that the cause of death was a blow upon the head, given apparently shortly before death, and, as there was a total absence of evidence to show whether either of the prisoners gave the blow, the prisoners were acquitted. This evidence of the medical men came upon the crown completely by surprise, and the counsel were not prepared to argue whether the parties could be convicted of an assault. It was thrown out by the learned judge whether they could not be convicted of the assault. It became his duty, then, to submit that they could not, and he cited the case of *Reg. v. Crumpton*, and there was an end of the question. There was no argument. The learned judge was to hold the balance between

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both parties, and when the counsel for the prosecution had no answer to give to that case, the learned judge had done right in ordering an acquittal. Since the trial, they had had occasion to go through all the cases, which showed that *Reg. v. Crumpton* was not conclusive. At the last Summer assizes the prisoners were indicted for an assault, and that raised the question whether they could not have been before convicted of an assault. The prisoners put in a plea of *autrefois acquit*, that the assaults included in the felony and murder charged upon them, of which they had already been acquitted, were the same as those charged in the present indictment. The replication was that they were not acquitted of the murder, including the same assaults charged in this indictment. No new assaults were proved. The learned judge (Mr. Gurney) called upon him to prove what were the assaults before proved. He produced evidence to show what had been proved on the first trial, and the prosecution called the surgeon to prove what was his opinion as to the cause of death, and that the assaults in question did not conduce to the death; and he, for the prisoners, contended that they were entitled to an acquittal upon the issue raised. The learned judge, however, directed the jury in these words: "I directed them, if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown." That was not the proper issue, nor the question the jury were to try. If the assaults had conduced to the death of the deceased, the prisoners were guilty of murder. The issue which the learned judge put to the jury was not raised by the pleadings, and it amounted to such a misdirection that the prisoners were entitled to the judgment of the court. The simple issue should have been this — whether or not the assaults now charged were the same assaults as those charged in the first indictment. The plea set forth a previous indictment for murder, and that the murder charged included divers assaults. A murder might possibly include divers assaults, and this indictment included those divers assaults which the prosecutor chose to charge in his indictment as causing the death. The plea then averred that the prisoners were acquitted of the murder, including those very assaults, and then came the question of fact for the jury as to the identity of the assaults, and they were admitted to have been identical. The issue joined, then, was upon that fact, and, if that issue had been left to the jury, they must have found for the prisoners. But a different issue was left to them. If the crown wished to raise a different issue, it should have been by pleading, and then the important question would have arisen, whether it was necessary, in case of murder or manslaughter, that an assault of which the party might be convicted under the statute must be an assault conducive to the death; but upon these pleadings that question could not be raised. This point was not argued the other day.

TALFOURD, J. That was one of the points powerfully put to us by Mr. Cox.

MARTIN, B. Yes; and it was a very important one.

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CRESSWELL, J. The question will be, whether you were acquitted before. Supposing Lord Denman's Act, enabling parties to be convicted of an assault, had never passed, of what then would you have been acquitted?

Slade. Of every thing contained in the indictment.

LORD CAMPBELL, C. J. Before that act passed you would not have been previously in peril.

CRESSWELL, J. You say now that you were acquitted, not only of the assaults which conduced to the death, but of all the assaults of which evidence could have been received upon this indictment, because you were in peril by reason of Lord Denman's Act; and the question is, whether you were in peril, and that depends upon another, whether the learned judge could have directed a conviction for an assault.

LORD CAMPBELL, C. J. The matter turns upon the construction of that act of Parliament. If, upon the construction of that act of Parliament, the prisoners might have been convicted on the first trial of an assault, then, upon the second trial they would be in peril a second time if they might have been convicted on the first trial.

ALDERSON, B. If they could have been convicted the first time, no doubt they were in peril.

LORD CAMPBELL, C. J. They could not have been convicted of the assault except under Lord Denman's Act. The question is, therefore, upon the construction of that act.

Slade. That did not get rid of the first question, whether the proper issue had been left to the jury. He would now turn to the second proposition, that the prisoners, having been once in peril, could not be tried again for the same offence.

LORD CAMPBELL, C. J. You have only to show that they were in peril the first time for the offence with which they were charged on the second occasion.

Slade. That question would depend upon the proper construction to be put upon Lord Denman's Act, 1 Vict. c. 85, s. 11. That section was in these words: "That on the trial of any person for any of the offences thereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." He apprehended that did not mean an assault in fact, but where the nature of the crime was such that, in contemplation of the law, the assault would be against the person. Before that statute, probably, the acquittal for a felony, which included an assault, would not have been a bar to a subsequent indictment for an assault.

LORD CAMPBELL, C. J. That is quite certain.

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Slade said there was some difference of opinion as to the mode in which that statute was to be construed, and this might be traced to a note in Mr. Greaves's edition of Russell, p. 782. Learned as was the editor, he believed the note had not met with the general approval of the judges. He must now go through the cases as they had occurred, after the passing of this act in 1837. The first case was in 1838, *Reg. v. Ellis*, 8 Car. & Payne, 654. It was an indictment for highway robbery with violence. The jury found a special verdict: "We find the prisoner guilty of an assault, but without any intention to commit a felony." It was held that the special finding did not take the case out of Lord Denman's Act, and the prisoner was sentenced for the assault. That was decided by Mr. Justice Allan Park and Baron Alderson.

ALDERSON, B. At one time I was of opinion that it depended upon the question whether the assault was charged as well as the other matters in the indictment, because I thought it was equivalent to finding so much of the indictment as amounted to a legal offence, though the crime was not charged as an assault; and at that time I thought it was not within the statute, because the party could not be found guilty of any part of the charge; but subsequently the judges had decided that the crime charged was that contained in the indictment, and if the crime included an assault, the party could be found guilty of an assault. Murder by poisoning did not include an assault, and therefore in such a case the party could not be convicted of an assault.

Slade. The next case was before Baron Parke, (1840.) *Reg. v. Guttridges*, 9 Car. & Payne, 471. That was a felonious assault upon a female: the felony was negatived, but there was a conviction for an assault. Baron Parke stated that in an indictment for felony the jury ought not to convict of a completely independent assault, but only of such an assault as was connected with the felony.

LORD CAMPBELL, C. J. Unless you allow a conviction where the act is done, but does not amount to a felony, I do not see where the benefit of the statute would arise, because, if it is a felony, the ends of justice are served without any such enactment.

Slade. If the parties could not have been convicted of an assault in this case, there was no case in which parties could be convicted of an assault. He was not prepared to say, because an assault was charged in an indictment for felony, that therefore a person might be found guilty of a disconnected assault.

MAULE, J. Such an assault could not be admitted in evidence; it would be irrelevant.

Slade. The next case was *Reg. v. St. George*, 9 Car. & P. 483. A man had presented a pistol at another, which was not loaded; the question was, whether that was an assault. Baron Parke said his idea was, that the prisoner could only be found guilty of an assault involved in the commission of the offence with which he was charged.

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The felony was negatived; but he was convicted for the assault. The next case was a remarkable one, and had before escaped his attention. *Reg. v. Brimlow*, 2 Moody, 122. It was a felonious assault upon a female by a boy under 14 years of age, by law considered incapable of committing the crime. He was acquitted of the felony, but convicted of the assault. This was afterwards affirmed by all the judges.

ALDERSON, B. He could not commit the felony, therefore the assault could not have conduced to a felony never committed. Nevertheless he was rightly convicted of an assault, under the statute.

Slade. That case proved his argument of misdirection. The assault could not conduce to the felony, because the felony could not be committed; and yet the boy was found guilty of the assault. The act of Parliament did not say where the crime of felony included an assault, but where the charge included an assault. That was the decision of the fifteen judges, and was the law of the land, and, as such, had been acted upon. In *Reg. v. Pool*, 9 Car. & P. 728, which was a charge of manslaughter, Baron Gurney said that, upon the evidence, the felony could not be sustained, but the prisoner might be convicted of an assault. That was exactly the case of the Birds; there was no evidence to show by whom the death was occasioned. The next case was in 1841, before the late Chief Justice Tindal. *Reg. v. M'Phane*, 1 Car. & Mar. 212. Three persons were indicted for cutting and wounding. The third man did not come up to the spot till the other two had gone away. Chief Justice Tindal held, that if the jury were not satisfied he had a felonious intent, they might convict him of an assault only. It was, therefore, not necessary that the assault should conduce to the felony charged, although they must be connected with the crime charged.

ALDERSON, B. That is the common-sense view of the statute.

LORD CAMPBELL, C. J. Do you say that, in an indictment for murder, any number of assaults may be given in evidence, and that a conviction would stand as to all of them, for instance, on assaults proved, with a view to show the *animus*?

Slade. I am not sure of that.

PARKE, B. Yes, if they be averred in the indictment as being a part of the offence of killing.

POLLOCK, C. B. Do you contend that it turns upon the object with which the assault was given in evidence?

LORD CAMPBELL, C. J. That would give to the prosecutor the power of convicting of an assault by showing that it was an assault which conduced to the death.

Slade. My point is, if the assault was charged in the indictment as leading to the murder, and evidence was given of it, the prisoner might be convicted of that assault.

POLLOCK, C. B. I want to know this: Do you say it turns upon

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the object with which it is given in evidence? If given for a collateral purpose, then he would not be in peril; but if given directly with that object, then he would be.

Slade said that would depend upon whether it was charged in the indictment.

ALDERSON, B. If it was such that the jury might have drawn the conclusion that it conduced towards death, then the man has been in peril for murder.

Slade. He was in peril for the assault. If the prosecutor had not called the medical testimony, but had rested his case upon the other facts, no doubt the jury might have drawn the conclusion that the death arose from those assaults which were given in evidence upon the felony; but the plea of *autrefois acquit* does not depend upon whether the proper evidence *was* adduced, but was proved by any evidence which *might have been* produced. In the case of *Reg. v. Shiel*, the proper evidence was not produced. In the case of *Reg. v. Phelps*, 1 Car. & M. 180, (1842,) it was held, that in an indictment for murder a party could not be convicted of an assault committed in a previous affray, the assault being in no wise connected with the cause of death. The judges said, the assault must be one that formed a constituent part of the greater charge of felony, not of a distinct and separate assault. He would now come to the case of *Reg. v. Crumpton*, 1 Car. & M. 597, (1842,) decided by Mr. Justice Patteson. It was a case of manslaughter of an apprentice, and the manslaughter was put an end to by the surgeon, who said the boy had died of consumption. It was submitted that he might be convicted of an assault. Mr. Justice Patteson said, "I think, in order to convict a person of an assault under this statute, it must be an assault which is the subject matter of the charge, and would of itself be a felony but for some other cause; if otherwise, it would be easy in a case of manslaughter to convict a person of an assault which had nothing to do with it. I think no assault is included in manslaughter which does not conduce to the death, and therefore the prisoner is entitled to be acquitted altogether." That was the case he had cited before Mr. Justice Talfourd, who had acted upon it, and Mr. Gurney, on the second trial, had adopted the very words. The next case was that of *Reg. v. Folkes*, 2 Moo. & R. 460, (1843.) In her trial for a felonious assault upon a child, the prisoner was acquitted of the felony, but convicted of the assault. The chief baron had expressed himself clearly of the opinion that the conviction was proper. In *Reg. v. Bankes*, Mr. Justice Maule had also given a strong opinion that, a child consenting, there was no assault.

MAULE, J. I rather think I have given two strong opinions, and different ones, too. I was rather disposed to think ultimately that a girl under ten could not consent.

Slade. The next case was *Reg. v. Archer*, 2 Moo. 282, (1843.) It was a case of felonious cutting with intent to murder; the prisoner was acquitted of the felony, but convicted of the assault. It came

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before all the judges, who held the conviction to be right. *Reg. v. Boden*, 1 Car. & Kir. 395, (1844,) was before Baron Parke. In this case Mr. Greaves's note was alluded to. It was an assault with intent to rob. The jury negatived the intention to rob, and Baron Parke thought the prisoner could not be convicted of an assault under the statute; but he conferred with Mr. Justice Coleridge, and then said there might be a conviction for the assault, and Baron Parke said the conviction was warranted when the assault tended to the felony. He would ask, if Mr. Justice Patteson had this case, what chance the prisoner would have had in coming to ask to be relieved in consequence of a conviction for the assault?

LORD CAMPBELL, C. J. You would look to the evidence, and not to the opening of counsel, or it would be open for the prisoner's counsel to say, "Although you opened this as conducive to the offence of murder, yet it has no such tendency, and, therefore, there can be no conviction for an assault."

TALFOURD, J. If the medical evidence had been called first, the evidence as to the assaults could not have been given at all.

LORD CAMPBELL, C. J. The order in which the evidence was called cannot affect the question.

Slade would suppose that the crown had rested their case without calling the medical evidence, and he had called them, could not the prisoners have been found guilty of an assault? The jury were not bound to believe the medical testimony, and, therefore, the prisoners had been in peril.

ALDERSON, B. A man may be charged with murder by many acts; if he is acquitted of the murder, is he not acquitted of all the assaults connected with that charge?

Slade. That is my proposition.

ALDERSON, B. Am I right in supposing that the second count charged that the murder was committed by divers bruises inflicted on different days, between the 5th of November and the 1st of January? Are they now indicted for assaults committed between those days?

Slade. Yes.

ALDERSON, B. Then the same assaults were included in the first indictment.

Slade. Yes. In *Reg. v. Lewis*, 1 Car. & Kir. 419, (1844,) which was a case of manslaughter, no evidence was given to show that the death was caused by any act of the prisoners. Mr. Justice Coleridge said, if the felony included an assault, although the felony was not made out, the man might be convicted of an assault. *Reg. v. Birch*, 1 Denison, C. C. 185; 2 Cox, Crim. Cas. 22; 2 Car. & Kir. 193, was the next and most important case. This was an indictment for robbery; the prisoners were convicted of an assault under the advice of

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Mr. Justice Patteson, but the point was reserved. Baron Parke delivered the judgment. The judges considered the prisoner properly convicted; they thought the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases where the indictment for the felony on the face of it charged an assault; but they were of opinion that, in order to convict of an assault, the assault must be included in the charge on the face of the indictment, and be part of the very act or transaction which the crown prosecuted as the felony by the indictment. In the present case, were not the assaults part of the transaction?

LORD CAMPBELL, C. J. The medical evidence might not have been believed, and then the prisoners might have been found guilty.

Slade. said that the test was not only the evidence that was produced, but that which might have been produced.

ALDERSON, B. I suppose the medical evidence went upon the ground that the death was solely to be referred to the blow.

Slade. Yes. *Reg. v. Birch* had been the ruling case ever since its decision.

LORD CAMPBELL, C. J. It is very materially in your favor when you show that these assaults were charged in one of the counts of the first indictment.

Slade. The next case after that was in the same year, *Reg. v. King*, 2 Cox, Crim. Cas. 95, decided by Lord Denman. It also was a case of manslaughter; the death was proved to have arisen from natural causes, and that the blows had no influence in causing the death; but Mr. Cooke Evans suggested that the assault might be found. Lord Denham said the question was, Did the charge made include an assault? If it did include the assault, it seemed to be the opinion of the judges that if the fact should be proved, and the felony failed, but the assault was established, the case came within the statute, and the evidence of the assault must go to the jury. In his case the evidence was directed alone to these assaults. There was another case in the same book, *Reg. v. Auty*, 2 Cox, Crim. Cas. 282, tried before Baron Platt, and Mr. Justice Williams was consulted. The learned judge said he thought he was called upon to leave the question of assault to the jury.

ALDERSON, B. You charge a man with assaulting and killing. He did assault, but he did not kill.

Slade. The next case was *Reg. v. Barnett*, 2 Car. & Kir. 594, which was an indictment for robbery, but the robbery was disproved. Mr. Justice Cresswell decided that the jury might acquit of the robbery, but convict of the assault.

CRESSWELL, J. Suppose they had averred that Mrs. Bird had inflicted the blow, and she had been found guilty of that blow, and

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then it would have been apparent the other blows were not connected with the death; the death by violence being the subject matter of the indictment, could they then have convicted of the assault?

Slade. Yes; if it was the same transaction.

JERVIS, C. J. Can you convict several defendants of several assaults when the murder is a joint transaction?

Slade. Perhaps there might be a difficulty. The last case was that of *Reg. v. Rooke*, an indictment for murder. The cause of death was proved to be inflammation of the lungs. Mr. Baron Platt decided that the jury could not convict of an assault, unless it was connected with the death; but he was of opinion the assault was included in the charge, and the person was convicted of an assault. He took the case from a report of the Central Criminal Court, 4 Cox, Crim. Cas. 400. The act of Parliament did not say the jury might convict of "an" assault, but of assault. The legislature had not imposed upon the jury the necessity of stating what assault.

TALFOURD, J. Then you say he might be found guilty of several assaults?

Slade. Assault is *nomen collectivum*.

WILLIAMS, J. Supposing upon this indictment there had been some additional evidence, and the prisoners were convicted of manslaughter for causing the death, could you have pleaded *autrefois acquit* to that indictment?

Slade. Certainly. Otherwise you might indict *ad infinitum*.

ALDERSON, B. If a person is indicted for murder by one blow, which would not have caused the death of a strong person, you may show the ill treatment which led to the weakening of the person; you may show the malice by the previous bad conduct.

Slade. I submit, then, first, that the learned judge had pressed upon the jury an issue not raised by the pleadings; and second, upon the authorities cited, that it was totally immaterial whether the blows conduced to the death or not, and that, as they had been part of the transaction charged, the parties had been in peril for those assaults at the first trial.

MAULE, J. It is uncertain how the deceased died. She is dead—but you cannot tell how. It is difficult to say that they could not have been convicted of an assault.

LORD CAMPBELL, C. J. Suppose the jury had disbelieved the medical evidence, they might have found them guilty; then it is difficult to say they were not in the peril of this assault, because, if they might have been convicted of the assault included in the murder, they might have been convicted of the assault when murder was no longer part of the charge. You say the direction on their second trial should have been whether those assaults were included in the first indict-

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ment. If so, they were in peril, although the charge of felony might not have been completely made out.

Slade. A felony of this description includes an assault in point of law. He submitted he had shown that there was a misdirection, and that the prisoners had been a second time put in peril, and he therefore prayed the judgment of the court in their favor.

E. W. Cox was about to address the court for the female prisoner.

LORD CAMPBELL, C. J. The court can only hear one counsel.

E. W. Cox. We appear separately for the prisoners.

ALDERSON, B. Did they sever in their plea?

E. W. Cox. No; it was a joint plea.

LORD CAMPBELL, C. J. Then they are not entitled to appear by separate counsel here.

E. W. Cox said it was allowed in *Frost's Case*.

LORD CAMPBELL, C. J. There the prisoners pleaded severally. This question was decided in *O'Connell's Case*. We cannot hear you.

E. W. Cox could only, then, put it to the court as a favor under the special circumstances. He had been heard without objection on the previous argument, and not anticipating an objection now, the same division of the argument had been made by arrangement now as then, and he was not going to travel again over the same question. He had to submit quite a different point.

Their lordships having consulted, —

LORD CAMPBELL, C. J. Under those circumstances, the court will hear you. But you must confine yourself to the single argument to which you allude.

E. W. Cox. Mr. Slade's argument has turned entirely upon the construction of the statute. He had now to submit that the prisoners were entitled to an acquittal upon their plea, independently of the statute.

ALDERSON, B. Do you mean that it would have been so before the statute?

E. W. Cox. Yes. He was prepared to maintain that, upon the general law of *autresfois acquit*, the prisoners having been, in fact, tried and imperilled, could not be again tried for the same act or transaction, whatever the legal name affixed to it. An acquittal for manslaughter was a bar to an indictment for murder, and *vice versa*, although they were different offences in law; and an acquittal for burglary with violence was successfully pleaded in bar to an indictment for murder. Why? Because the same act of the prisoner had been once investigated, he had been tried for it, and might have been lawfully convicted of it. The mistake lay in confusing a question of evidence with a question of law. If the act charged as an

offence can be put in evidence at all, the jury may convict upon it *lawfully*, and however unsatisfactory to the reason such a conviction might be, it would be good in law, because it was within the province of the jury, and there would be no remedy but the royal pardon. If, then, the jury might lawfully convict, however unreasonable such conviction might be, the prisoners are in peril. Here they might have convicted, if they had pleased, even against the direction of the judge, and that would have been a lawful conviction.

CRESSWELL, J. But this is an indictment for a misdemeanor, and *autrefois acquit* of a former felony cannot be pleaded to that.

E. W. Cox. There is no authority for this general assertion of the books. The case in *Strange*, upon which it is said to be founded, does not in any way justify such a conclusion, and it is contrary to the principle of *autrefois acquit*.

ALDERSON, B. You say, then, that the practice of centuries is wrong, for the judges continually direct an indictment for the misdemeanor after an acquittal for the felony. You say that in such cases *autrefois acquit* might be pleaded.

E. W. Cox. Yes, if the very same *act* was charged in the second indictment as in the first. But this seldom happens, for usually it is for a distinct act and offence, as for attempting to commit a felony and such like, which involves something more than the mere act charged in the first indictment. If it were not so, the monstrous consequence follows, that where a manslaughter is charged by a long series of beatings, the prisoner might be convicted and punished for the manslaughter, and then indicted and punished for each of the beatings.

LORD CAMPBELL, C. J. No. The misdemeanor would be merged in the felony.

E. W. Cox. Only so much of the whole transaction as actually produced death. If the reading of the statute contended for by the crown is right, the consequence suggested would result. The injustice of it would be obvious in case of a conviction, but the argument was in law equally applicable in case of an acquittal. But he would not press that now. Then, even if the statute alone is to determine this question, he contended that, apart from any construction of the limit of its application to assaults connected with the charge of felony which the court might entertain, the prisoners were entitled to *autrefois acquit*.

LORD CAMPBELL, C. J. You are travelling into Mr. Slade's argument.

E. W. Cox. No. He was contending that, as a consequence of the statute, apart from any differences as to its *meaning*, the prisoner had been in peril. The argument was very short, but it seemed to him conclusive. The statute gave to the jury, and to the jury alone, the power of finding the prisoners guilty of assault. It did not say, "if the court shall direct," but "it shall be lawful for the jury," "if the

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evidence shall warrant such finding ;" that is, if in *their* opinion, as a question of *fact*, it shall do so. Now the statute having vested this power in the jury, whether so directed by the judge or not, and even against his direction, if they pleased, they *might* exercise the power so given to them, and coming to the opinion that the evidence did warrant such a conclusion, find a verdict of assault. In this case the assaults in question were in evidence ; the jury might, if they had chosen to do so, have used the power given to them by the statute, and said that the evidence did warrant them in finding the prisoners guilty of assault, and might lawfully have convicted them of it accordingly ; and, therefore, inasmuch as the jury might then and there have lawfully convicted them, they have been, in fact, in peril for those assaults, and are entitled to their plea of *autrefois acquit*.

Rowe, Q. C., with whom was *Karslake*, contended for the crown, that the conviction must be confirmed. He agreed that if the prisoners could have been legally convicted of the assault of the 10th of November, on the first trial, they could not a second time be tried for the same assault ; but he contended that they had not before been acquitted of that charge, and could not legally have been so acquitted, and therefore they had not before been in peril. It must be identically the same transaction, identically the same peril. He would first address himself to the construction of Lord Denman's Act. The way in which the case had been opened to the jury could not be a test as to the construction to be put upon this statute. Mr. Gurney, at the foot of the case, had stated the circumstances under which the case was opened to the jury in March. The counsel said, if he should fail in proving that these assaults were included in the principal charge of murder, he should nevertheless insist upon these assaults as proving the *animus* of the case. It was first material to show of what these parties were acquitted in March.

LORD CAMPBELL, C. J. They were acquitted of all those things of which they might have been convicted ; therefore it is material to see of what they might have been convicted.

Rowe would ask what was the meaning of the words in the statute "of the crime charged" ? It must mean the crime as averred on the face of the indictment.

ALDERSON, B. Does not the crime charged necessarily include the assaults, although they are not expressed ?

Rowe. The charging the crime on the face of the indictment has little to do with the matter ; those who framed the statute contemplated a class of felonies in themselves, *vi termini*, involving an assault, as the minor proposition is included in the major.

LORD CAMPBELL, C. J. A murder may involve several assaults. Suppose the statute had been thus : Upon the trial of any person for any of the offences herein mentioned, which crime shall include an assault, it shall be lawful to acquit of the felony and find the parties guilty of an assault. Several assaults are charged upon the indict-

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ment as included in the murder; if the statute had been framed so, might not the prisoners have been acquitted of the murder, and found guilty of those assaults?

Rowe apprehended not. The object of the statute was to enable the jury to act under the direction of the judge, when the judge might consider it his duty to direct the jury particularly upon the question of assault. It was clear that an indictment for rape was good, although there was no allegation of an assault.

LORD CAMPBELL, C. J. It is unnecessary to charge an assault, because it is utterly impossible to commit the crime without an assault.

MAULE, J. Murder can be committed without an assault.

ALDERSON, B. It does not include an assault necessarily.

PARKE, B. To avoid any discussion of this sort, Mr. Baron Bolland and myself, the first circuit we went after the passing of the statute, directed the clerk of assize to introduce the assault into the indictments.

Rowe. The averment of an assault would not bring a case within the statute which was not within the statute before. In the case of *Reg. v. Dilworth*, 2 Moo. & Rob. 531, the evidence established the fact that the mode of poisoning was by forcibly assaulting the party and putting the poison into the mouth. The felony was not proved, and it was submitted that the prisoner might be convicted of an assault; but Mr. Justice Coltman said it was not within the statute, and there was no averment of an assault upon the face of the indictment.

ALDERSON, B. Suppose the indictment had charged an act of omission, and had said he made an assault, and it was proved that the charge of omission had failed, could the man have been convicted of slapping the other's face?

Rowe. I apprehend not.

MAULE, J. This is an indictment for murder by blows. Do you conceive that this is an indictment which does not charge an assault within the meaning of the statute?

Rowe. The averment in the indictment was not the test. If a murder was effected by a blow, whether there was an averment for an assault or not, it was immaterial.

MAULE, J. Is it the consequence of that immateriality that such a case is not within the statute?

Rowe. The blow struck was the actual assault involved in the major proposition of the felony, and then he could not be tried again for that assault.

MAULE, J. Then you hold that the crime charged in this indictment includes an assault?

Rowe. No doubt.

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MAULE, J. The indictment charges that the blows were given, and killed the girl; and the question was, whether that was the assault or not.

Rowe. A different assault was not within the statute.

MAULE, J. When you want to know what the charge is, you must look at the indictment.

Rowe. Not so, but to the evidence. The indictment is in general terms, and the prosecution is not bound by averment of time or place.

LORD CAMPBELL, C. J. If you want to know what the charge is, surely you must look at the indictment.

MAULE, J. You say that if you look at an indictment, and I say, Does the crime charged include an assault? the answer is, "I cannot possibly tell."

Rowe. The indictment is not the test.

ALDERSON, B. Here the second count charges a great number of assaults; do you mean to say that this was not an assault charged?

Rowe. Not within the meaning of the statute. In the case of *Reg. v. Watkins*, which was a burglary with intent to commit a rape, an assault was set out on the face of the indictment. It was held that the case was not within the statute.

ALDERSON, B. Because the whole crime was the breaking and entering with intent to commit a rape.

MAULE, J. According to your statement, you could not have found any thing from that indictment; you mean to say, sometimes you can, and sometimes you cannot?

Rowe apprehended it was so. An averment of an assault proved nothing one way or the other. It was essential, not only to look at the words of the indictment for the crime charged, but to go further. The statute provided for any crime, where the crime charged included an assault, that the jury might then acquit of the felony and convict of the assault.

MAULE, J. What are the jury to consider that the crime charged means?

Rowe. They are to hear what the judge says about it.

WIGHTMAN, J. Where is the judge to look for it?

Rowe. The learned judge in *March* was of opinion that the question of assault could not be put to the jury when the evidence failed as to the felony, in which he entirely concurred. He put it to the learned judge that there was evidence of an assault; they were acquitted of the capital charge because there was no evidence that

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one or the other struck the fatal blow, therefore there was no evidence to go to the jury. As to the assault, he had suggested there was evidence for the jury.

TALFOURD, J. The suggestion proceeded from you. You said, "Cannot they be found guilty of an assault?" I think I said, "Was there any evidence of a joint assault? These are separate assaults." You referred to some one of the strongest cruelties practised on this unfortunate girl. I said that would not be a joint assault, unless by both, and then *Slade* rose with the case of *Reg. v. Crumpton*. You acquiesced, and said, "We have done all we can." That, I think, is what took place.

Rowe felt it his duty to suggest that there might be a case of assault; but *Reg. v. Crumpton* put an end to the case; he acquiesced, believing, as he still did, that it was correct law. Two difficulties had suggested themselves upon this statute; the one had been raised by Mr. Greaves's note, and the other was to how far an assault not immediately connected with the capital charge could be left to the jury. He apprehended that, upon that point, the cases down to *Reg. v. Birch* were conclusive.

LORD CAMPBELL, C. J. Is not the assault included in the crime charged in the case of murder, where a prisoner is charged with maliciously giving another mortal blows and committing murder, and it turns out that the blow was given, but that a murder was not committed, for that the supposed deceased is present at the trial? Would not that assault be involved in the crime charged?

Rowe. Not if that assault was shown to have nothing to do with the main fact.

MAULE, J. You do not mean to say that it is necessary that the death should take place? You cannot mean that unless a felony is committed, you cannot convict of an assault.

Rowe would refer to the case of *Reg. v. Connor*, 2 Car. & Kir. 518. There an acquittal was directed, because the death was not connected with the assault.

LORD CAMPBELL, C. J. Unless we saw the indictment, we could not say how far the cases were similar.

POLLOCK, C. B. A person is charged with an assault which for a moment is supposed to have conducted to the death, and he is charged with murder, and, upon examination, it turns out that he had nothing whatever to do with it, that the death proceeded from natural causes, and great injustice had been done to the prisoner to charge him with murder at all; that does not apply to a case where the charge is that you have produced the death of this person by a series of assaults, and the charge is made out with the exception of proving that the death was caused by them. It turns out that it may have been that the deceased died from a blow which might have been inflicted by both or one of the prisoners, but there is no evidence to prove it; it

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is a failure of evidence. If the jury believed it had been inflicted by one of the prisoners, but there is no evidence by which, that was the reason why the acquittal took place, the matter would have been more clear if the surgeon had said, "The young woman died from no assault, but from some other cause."

Rowe thought the facts very similar.

ALDERSON, B. Was this caused by the different assaults, or by the one? If the latter, then it is not proved whether the prisoners committed it; if the former, you ought to convict. Surely they have been in jeopardy before.

LORD CAMPBELL, C. J. The learned judge stopped the trial, and he is supposed to have put the whole question to the jury, and their verdict is given.

Rowe. The learned judge was of opinion that the jury could not take cognizance of the assault.

LORD CAMPBELL, C. J. It was more a matter of fact than of law, because, if it had not been for the medical evidence, the learned judge would have left it to the jury.

ALDERSON, B. Suppose one medical man had assigned the death to one cause, and another to another, it must have been left to the jury.

Rowe. Beyond all doubt. The prisoners' counsel said, in point of law, you cannot put the assault to the jury.

JERVIS, C. J. How does that alter the legal liability of the parties?

Rowe submitted that they were disconnected by the evidence, and if the evidence had been doubtful, the judge would have been bound to leave the case to the jury; but, as there was no doubt, the learned judge acted accordingly. He did not mean to say that if the learned judge acted erroneously, the plea of *autrefois acquit* would not lie; but he considered the learned judge was perfectly correct in what he did.

COLERIDGE, J. Suppose the medical evidence to be this: we are quite satisfied that the falls did not cause the death, but we do not know what did, and the jury had acquitted; after that, could they have been indicted for the assault?

ALDERSON, B. Suppose the judge had summed up the evidence of two opposite medical witnesses?

Rowe admitted that, if the evidence had been conflicting, then the prisoners would have been in peril. The assaults were disconnected at that time, and the learned judge would not have been justified in leaving the jury to come to a conclusion upon any one of these acts. The learned counsel then reviewed *seriatim* the cases cited by the counsel for the prisoners, and urged that the prisoners had not before been in peril. It was the duty of the judge to say that these assaults did not conduce to the death, and, therefore, were not within the cognizance of the jury upon that indictment.

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COLERIDGE, J. He could only say that upon the evidence of the surgeons, and that was for the jury. It was not a matter of law. It was for the jury.

Rowe contended that these parties were not in March put on their trial for the assaults for which they were indicted in the autumn; the moment the evidence showed that the assaults had nothing to do with the death of the girl, then those assaults were irrelevant altogether, and the party was never in peril, and therefore might be tried again.

MAULE, J. I suppose you say that, although the statute enables the jury to convict, yet that it is not compulsory upon them to do so?

Rowe. It was not compulsory on the learned judge to put the question of assault to the jury. He also urged that there was no misdirection on the part of Mr. Gurney. Under all the circumstances, he submitted the prisoners had been properly convicted of the assaults.

PATTESON, J. If one of the prisoners had been found guilty of the murder, and the other of the assault, as, according to your argument they might have been, how, and in what form, could a verdict of guilty of an assault have been entered on the first indictment?

Slade did not know how the officer would have entered it.

E. W. Cox. By a general verdict of guilty against one, and a verdict of assault against the other.

The court took time for consideration.

JUDGMENT. February 12, 1851. MARTIN, B. At the Exeter Spring assizes, the prisoners were indicted for the murder of Mary Ann Parsons. The indictment contained six counts. The first charged the murder, by striking with a stick; the second, by divers beatings, between the 5th of November, 1849, and the 1st of January, 1850; the third, by beating, on the 5th of November and the 1st of December, 1849, and the 1st of January, 1850, and on divers other days between the 5th of November and the 1st of January; the fourth, by blows inflicted with a scourge; and the fifth and sixth by casting her on the ground. At the trial of the indictment, the counsel for the prosecution opened all the above assaults as conducing to the death, but stated that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. It was proved at the trial that the death, which took place on the 4th of January, 1850, was caused exclusively by one particular blow on the head, and there being no evidence that this blow had been struck by either of the prisoners, they were acquitted. At the last Exeter Summer assizes, the prisoners were indicted for the misdemeanor of having assaulted Mary Ann Parsons. The prisoners pleaded *autrefois acquit*, which was traversed. The record of the former trial was put in evidence, and it was proved that evidence had been given thereat of different assaults committed by the prisoners upon the deceased, throughout the months of November and December, 1849. One on the 5th of November, with a stick; another at the end of

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November or beginning of December, also with a stick; and another with a furze bush, about the 11th of December; and it was not proved at the second trial that there were any other assaults committed but those which were given in evidence at the first trial. The learned judge directed the jury that if there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown. Upon this direction, the jury found a verdict for the crown, and the learned judge stated a case, containing the foregoing statement, for the opinion of this court. The substantial question now to be decided is, whether, upon the trial for the murder, the prisoners could lawfully have been convicted of these assaults under the 11th section of the stat. 1 Vict. c. 85; for it was conceded by the counsel for the crown, that if they could have been so lawfully convicted, they cannot be tried a second time for the same assault, the principle of law being that a person cannot be more than once put in a peril of the same character for the same act or acts. I am of opinion that they could have been so lawfully convicted. The section enacts, "that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The true rule for the construction of a statute, in my opinion, is that laid down by Mr. Justice Burton, in *Warburton v. Loveland*, and stated by Mr. Baron Parke, in 2 Mee. & W. 193, that courts ought to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, and no further. Now, to apply this rule to the present case. The first trial of the prisoners was for a felony. The crime charged, viz., murder by violence, included in the several counts of the indictment assaults against the person; the evidence of these assaults was lawfully given and received in alleged proof of the murderous deed. The jury acquitted of the felony, and the evidence, in point of fact, clearly warranted the finding the prisoners guilty of assault, and so also in law, inasmuch as there was no lawful excuse or justification of them. The case, therefore, seems to me to fall within the very words of the statute. Then, is this construction at variance with or repugnant to the intention of the legislature, to be collected from the statute, or does it lead to any manifest absurdity? It seems to me that it is in conformity with the intention of the legislature, so far as I can collect it, and I am not aware that any one has contended that it is absurd. The statute was to amend the laws relating to offences against the person. At common law, a misdemeanor could not be joined in the same indictment with a felony, and the consequence was that in all cases of alleged felonious offences against the person, if the prisoner was acquitted of the felony, he was free altogether upon that indictment, and a fresh indictment was necessary in order

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to bring the offender to justice. The object of this enactment was to prevent the necessity and make provision for the conviction and punishment of the offender in the then present trial; and it seems to me that the object and spirit of the enactment is to enable the guilty person, although he be acquitted of the felony, to be at once convicted and punished for the assault, if he be charged with it in the indictment. If the construction contended for by the counsel for the crown be the correct one, and the assault must conduce to the death, the consequence seems to me inevitable, that, in all cases of alleged murder or manslaughter, there cannot be a conviction for an assault at all under the statute; for if the assault conduces to the death, the party whose assault is so conducive must either be guilty of murder or manslaughter, or his assault must be a justifiable act. It would be absurd to contend that a justifiable act would be an assault within the meaning of the section, and therefore it seems to me the argument for the crown must go the length of contending that the statute does not apply to cases of murder or manslaughter at all. I do not go into cases of other felonies, although I believe the same consequence will legitimately follow from the same line of reasoning, and the statute would, if it be correct, be wholly inoperative. But I do not think this is the correct construction of the statute, and in my opinion the true criterion is, is the assault, in point of fact, charged upon the face of the indictment, and is it part of the act or transaction which the prosecutor gives evidence of as conducing to the felony? If it falls within these two categories, in my opinion, the prisoners may be lawfully convicted of it by virtue of the statute. Take the third count of this indictment; that is, the count for beatings on the 5th of November and 1st of December, 1849, and the 1st of January, 1850, and on divers other days between the 5th of November and the 1st of January. Suppose there had been no evidence of the particular blow which is said to have caused the death, and the jury had not been satisfied that these blows, which it seems to me are specifically stated in this count, had caused the death, but the case had been left to them by the judge as a fair case for them to exercise their judgment upon; if these blows conduced to the death, the prisoners were guilty either of murder or of manslaughter; but if they did not conduce to the death, according to the argument for the crown, the jury ought to have been told that they could not find them guilty of the assault. It seems to me that the statute was intended to meet this very case; and if so, I think the proof of the particular blow that caused the death cannot alter it.

Again: suppose the evidence of the particular blow had been given on behalf of the prisoners, as it was a fair question of fact for the jury whether the violence by the beatings, or by that blow caused the death, this seems to me to be directly within the statute, and it cannot, in my judgment, make any difference on behalf of which party the evidence was given at the trial. On the argument a great number of cases were cited; but there are only three to which I think it necessary to refer, viz., the cases of *Reg. v. Phelps*, *Reg. v. Crumpton*, which were principally relied on by the counsel for the crown; and *Reg. v. Birch*, which was principally relied on by the counsel for

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the prisoners. *Reg. v. Phelps* was tried at the Summer assizes, 1841, and the report states that the first count of the indictment charged the prisoners as principals in the first degree for the murder of John Overbury, by striking and beating him. The second and third counts charged Phelps as principal, and two others as principals in the second degree, in the following form: "That the said Southan and Smith, (the two other persons in the indictment with Phelps,) at the time the felony and murder was committed, were feloniously present, abetting, aiding, and assisting the said John Phelps." The statement of the evidence is, that as the deceased was going away from a public house, Phelps struck him several times, and he was afterwards killed by violence, and the evidence went to show that the prisoner Phelps had gone away before the violence which caused the death was inflicted. The charge of murder, therefore, failed, and the prisoner Phelps was found guilty of an assault. The counsel for the prisoners objected that Phelps could not be convicted of the assault, as the assault was totally independent of the felony. It was urged by them that it was only when the assault is included in the felony charged, that a conviction for an assault can take place. There the case was the same as if Phelps had struck the deceased, and afterwards some person wholly unconnected with Phelps, and not knowing that he had struck the deceased, had killed him after Phelps had gone away. Mr. Justice Coltman reserved the point, and the judges were of opinion that the conviction for the assault was wrong. I think this case distinguishable from the present; according to the report the indictment does not charge the prisoner with beating the deceased, specifying with particularity and precision certain beatings alleged to have been given, and drawing a conclusion that thereby the death was caused, but rather seems to charge as the beatings those only by which the death was caused. Now, if this be the true construction of the indictment, the decision is exactly conformable to my view of the right construction of the statute; for the beatings charged in the indictment would be the beatings which caused the death, beatings with which Phelps had nothing to do, and, therefore, the beatings which Phelps inflicted were not charged in the indictment at all; and if so, in my opinion, he could not be lawfully convicted of them. But in the present case the beatings, which are charged in the indictment for the misdemeanor, are the same identical beatings which were charged in the indictment for the felony, stated and here marked as it were with certainty and precision.

In the latter indictment, it is true, a false conclusion, in fact, is alleged; viz., that they caused the death which they did not. But they were charged in the indictment as the cause of death; and, as I have already said, in my opinion, it was competent for the jury to find the prisoners guilty of these beatings and to acquit them of the felony. If, however, the indictment did charge the specific assaults committed by Phelps, I can only say that the judgment seems to me to be at variance with the subsequent case of *Reg. v. Birch*, which I consider a better authority, and in point with the present.

Reg. v. Crumpton was tried at the Spring assizes, 1842, and the

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first count of the indictment charged that the deceased was the apprentice of the prisoner; that it was the duty of the prisoner to suffer and permit him to take such proper exercise as was necessary for his bodily health, and to find and supply him with proper and necessary nourishment, medicine, medical care and attendance; and that the deceased, being weak in body, the prisoner struck and beat him, and forced him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care and attendance, by means whereof he died. The second count charged that the deceased being such an apprentice, the prisoner feloniously did make an assault on the deceased, and being weak in body, the prisoner forced him to work for unreasonable and improper times, and beat him; by means whereof he died. The evidence was, that the prisoner was a tailor, and the deceased was his apprentice; that the latter had been in ill health for a year before his death, and had a bad cough, and was kept at work on some occasions from six o'clock in the morning, until eight or nine in the evening; and that, about five weeks before his death, the prisoner beat him with a small cane. That about three weeks before his death he left the prisoner's house and went to his grandfather's, where he died; and the surgeon, who made a *post mortem* examination, stated that he died of consumption; that over-work and ill usage might have accelerated his death, but he was not able to say that it had done so; he stated, also, that there were some bruises on his legs, but they could not at all have contributed to the death. It was urged that the prisoner might be convicted of the assault. Mr. Justice Patteson is reported to have said, "I think that, in order to convict a person of an assault under the statute, it must be an assault which is the subject matter of the charge, and embodied in the charge, and which would itself be the felony, but for some other cause." Now this, in my judgment, is the true construction of the statute as it is; because the assaults in the present case were the subject matter of the charge, and embodied in the charge; and if the death had arisen from them, they would have been the felony; therefore, I am of opinion that the case is within the statute. But the learned judge goes on to say, "I think no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be manslaughter;" and as the surgeon disconnected the assault from the death, he directed an acquittal altogether. Upon the best consideration I have been able to give to this question, I cannot concur in this latter part of his lordship's judgment. The conducing to the death does not, in my opinion, form the test.

In *Reg. v. Birch*, which was tried at the Spring assizes, 1846, the indictment charged the prisoner with an assault and a robbery of a watch and money. The person supposed to have been robbed did not appear at the trial; but witnesses who saw the transaction proved that the prisoner struck the person named in the indictment. The jury stated they were not satisfied that there was any intent to rob, and they found the prisoner guilty of an assault. Mr. Arm-

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strong, who tried the case, after consultation with Mr. Justice Patterson, reserved the case for the opinion of the judges; and upon that occasion they gave an exposition of the statute. It is thus stated in 1 Den. p. 186: "The enactment is not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony; nor is it to be extended to all cases in which the indictment for a felony on the face of it charges an assault. In order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment." It is thus stated in Carrington & Marshman: "The opinion of the judges was, that the statute applies whenever the indictment charges an assault, and the jury, negating the felony, finds guilty of the assault; provided always, that the finding be in respect of the very same acts which the crown seeks to make felonies. Identity being the question, and not the intention of the prisoner to commit felony, otherwise the statute would not apply to the ordinary cases of wounding with intent," &c. In my opinion, this is the correct exposition of the statute. But even supposing I did not concur with this judgment, it seems to me it would nevertheless be my duty to submit to it. It is the unanimous judgment of the judges upon the point given judicially upon the construction of the statute; and if such a judgment is not to be held conclusive, I am at a loss to know how certainty in the law can be attained. I do not mean to say that if the very improbable case occurred of a unanimous judgment being clearly and obviously and manifestly wrong and absurd, I would consider myself absolutely estopped from exercising my own reason and judgment in respect of the point decided; but what I mean is, that if there be a unanimous judgment upon a point of difficulty and nicety, upon which a difference of opinion might have reasonably existed, and did exist before such a judgment, I think after such judgment I ought to be bound by an act upon it, and consider the matter to be settled and at rest. In my opinion, this judgment directly applies to the present case, and ought to be conclusive upon it. As I am, therefore, of opinion upon the substantive question that the prisoners were by law entitled to have the verdict found for them upon the issue on the plea of *autrefois acquit*, I do not think it necessary to give any opinion upon the other two questions raised by the counsel for the prisoners.

TALFOURD, J. I am of opinion that the conviction is right; that this plea of previous acquittal was not and could not be sustained; and that the charge of the learned judge who tried the issue joined on that plea presented to the jury the only question, which, if decided in favor of the prisoners, could have entitled them to judgment. On behalf of the prisoners two points were argued, and most ably argued at the bar: first, that the prisoners might have been equally convicted of the assault which formed the subject of the indictment for misdemeanor on the previous indictment for murder; and secondly, that the learned judge at the trial of the issues on the special plea

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misdirected the jury. The first and main question turns on the construction of the statute which, for the first time, enabled juries to convict of common assault in an indictment for felony. That statute was passed "to amend the laws relating to offences against the person," and, repealing antecedent acts, it proceeds to define the punishment of several offences of the description which its title indicates, and it is not immaterial to the true construction of the clause which refers to these offences to bear in mind their character. These are, attempts to murder, by various means stated, producing wound or bodily injury, which are made punishable with death; the attempt to administer poison, the act of shooting, the attempt to discharge loaded arms, the attempt to drown, suffocate or strangle, with intent to murder, though no bodily injury be produced, which are made felony and punishable with transportation, — similar acts committed with intents short of murder, made punishable also with transportation, and other felonies which do not necessarily involve violence. All these crimes are, in their nature, single definite acts; not results from several acts, each act itself being a substantive felony.

The 11th section of the 1 Vict. c. 85, enacts, "that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatsoever, where the crime charged shall include *an assault* against the person, it *shall be lawful* for the jury to acquit of the felony, and to find a verdict of assault against the person, *if the evidence shall warrant such finding.*" The consequence of such a verdict of guilty of assault may be imprisonment for three years with hard labor, and solitary confinement for a month at a time, not exceeding three months in any one year, at the discretion of the court. Two questions arise upon this clause: What is the meaning of "the crime charged"? and what is the case in which "the evidence shall warrant the finding" of guilty of assault against the person? By "the crime charged" I understand the act of felony of which the prisoner is accused, and for which he is tried, and which, by the practice of the law, well settled long before the statute, can only be a single felony, and in the case of murder must be, of physical necessity, single, when applied to one person. The "crime charged" has, in my judgment, no reference to the various statements which, at his will, in various counts, the prosecutor places on the record, but to the *corpus delicti* for which alone, though variously stated, the prisoner can be required to answer. Considered with relation to the context, the meaning of this phrase is obvious, that whereas some of the offences "before mentioned" in the act *do* include an assault against the person, as rape, or stabbing, and others *do not* include it, as the attempt to procure abortion, or the administration of poison, the statute applies its provisions to the former class of crimes and other felonies the like in character. To support the construction that the "crime charged" means the crime as varied, and presented as many crimes on the face of the indictment, the words should have been "crime *as* charged." It is further to be observed, that it is not necessary to state in the indictment that the party accused "made an assault," where the offence necessarily implies violence, as has

been decided in the case of rape, *Allen's Case*, 2 Moo. Crown Cases Reserved, p. 179, and will be found illustrated by the greater number of precedents of indictments for murder by violence in the second volume of Chitty's Criminal Law. The crime of murder is comprehended in the terms "any felony whatsoever," and, therefore, if there is any case of murder to which the statute can be practically applied, it may be so applied; but considering that the statute enumerates many felonies of inferior atrocity to murder, of which the attempt to commit murder is the highest, all single acts to which the application of the statute is easy. I do not believe it was in the contemplation of the legislature to include under the word "felony" cases of death, which are not cases of mere act, but of act followed by a consequence. Without, therefore, meaning to affirm that the case of murder cannot be brought within the statute, by reason of the insufficiency of its language, I think no argument will be supplied against a construction which excludes the case in judgment, if it should follow that few cases — or even no cases — of felony involving death would be practically within the operation.

The next question, arising on the meaning of the words "where the evidence shall warrant such finding," is, When does the evidence warrant a finding of assault on an indictment for felony? The answer I offer is, when the very assault which the crime includes, and which, either by reason of the non-completion of a purposed felony, or the absence of intent imparting to the assault a felonious character, though proved by the evidence, is also, by the evidence, shown not to amount to felony. The words "an assault," in the first member of the clause, and the word "assault," in the last member of it, are correlative terms; they do not reasonably import that if the crime includes one assault, the party accused may be found guilty of another assault, but must be read as if the word "said," or "such," preceded the latter word "assault," in which case, thus far, at least, the meaning would be clear.

If this construction, which seems to me to be the true literal interpretation of the passage, is erroneous, I see no other sensible construction than that which has been repudiated in argument, that, wherever a crime includes an assault, and the evidence proves an assault, however unconnected with the felony charged, and for whatever purpose offered in proof, the statute applies. If once it be conceded that it does not so necessarily apply, I see no middle course that is not founded on arbitrary conjecture, and dependent on circumstances rendering its application uncertain. The intermediate course of construction proposed I take to be, that wherever, in an indictment for murder, assaults are charged in any of its counts as the means of committing the felony, and those assaults are adduced in proof by the prosecution as conducing to the death, and are proved by the evidence to have been in fact committed, although by that evidence they are entirely disconnected from the *corpus delicti* charged, the party accused may be convicted of such assaults, and this although the indictment contains a count correctly describing the means of the death which is not brought home to the prisoner. If

this be so, consequences never contemplated may follow from the allowance of several counts in an indictment for murder. In case of murder, as in case of other felonies, each count on the face of it charges a separate felony; and yet it is obvious that unless a different person be supposed to be murdered, only one felony of death can be proved; and it is certain, that if the court were apprised before plea that two distinct murders were meant to be alleged, they would quash the indictment, or, if after plea, they would compel the prosecutor at once to make his election on which charge he would proceed. But, if by the introduction of six counts into the indictment, stating the cause of the same death in six different ways, the prosecutor might obtain a verdict of guilty of assault on any count which charged it, though the assault was proved in fact to have had no connection with the death, he would obtain the benefit of substantially charging as many felonies as counts, not in order to obtain a conviction of the principal charge, but of an assault altered in its penal consequences by arbitrary position on the record. Nay, if there should happen to be as many defendants as counts, and each count should charge (as it must) a different mode of death, and by different assaults, although the death should be proved to result from one act only, and that act committed by a single prisoner, or by a stranger, but each prisoner had committed such assaults as there alleged, each might be convicted of his own separate assault, and this although the prosecutor would not be permitted to prove more than a single felony as involving them. A single charge of murder may thus justify a conviction of numerous assaults on counts which may be introduced or used for the purpose of affixing to a single offence, or to such offences, aggravated penalties.

But again: the statute, when describing the offences to which it applies, uses the word singular, an "assault;" in stating the matter of which the accused may be convicted, it uses the word "assault." Is it assumed that the party accused can be convicted of more than one assault? If he cannot, there is an end of the plea of previous acquittal, because the second indictment in this case charges two assaults; and surely, if the prisoners could only by law have been convicted of one on the former trial, they were only in peril in respect of one, and the plea is no answer, unless one can be found to be identical with two. If it is contended that they may be so convicted, what is the consequence? A count in an indictment may charge divers assaults at least between the first and last days of a year; these assaults may be charged in general terms, under which, proof of the most aggravated assault or assaults, not amounting to batteries, may be offered, and a party proved to have committed one of the slightest possible assaults may be convicted, and subjected to infamous punishment, which else could not have been inflicted. If the circumstance that the indictment comprises a count which charges assaults to which proof corresponds does not bring the case within the statute, surely the opening speech of the prosecutor's counsel, founded on instructions given by an individual client, though using the name of the crown, perhaps, made from imperfect materials,

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cannot change the legal character of an act elicited in proof so as to affect the prisoner's liability to punishment. The evidence does not, more or less, "warrant the finding" because of the preface made to it, or the purpose for which it is used. The question is not whether the proof of assault was relevant to the issue, as it might be to prove malice, or whether it was offered in the expectation that it would be shown to be connected with, by conducing to the death; but whether on the whole case developed in evidence it was, in very deed, parcel of the act which is prosecuted as felony. This I take to be the doctrine acted upon by Mr. Justice Patteson in the case *Reg. v. Crumpton*, and acted upon at the first trial, and adopted by the learned commissioner, Mr. Russell Gurney, on the second trial. Of the authorities in argument, the most important are, *Reg. v. Phelps*, decided in 1841, 2 Moody, Cro. Cas. Rep. 241, relied on for the prosecution; and *Reg. v. Birch*, decided in 1846, relied on for the prisoners, because these are the unanimous decisions of all the judges. In *Reg. v. Phelps*, the prisoner was indicted for the murder of John Overbury, who was slain in a scuffle. Phelps, with others, had assaulted the deceased on the evening of his death, but quitted the affray, which was afterwards renewed, and in which mortal blows were inflicted by persons unknown; there was no distinct evidence to show what led to the second assault on Overbury, or to connect it with the prior assault by Phelps. The jury acquitted Phelps of the murder, but found him guilty of an assault, and the point, whether he could be so legally convicted, was reserved. The judges were unanimously of opinion that the conviction was wrong, as they observed that "the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault, as this was." It seems so difficult to distinguish that case from the case in judgment, that if this conviction be held wrong, it must, in my opinion, be by overruling that decision. Although, in the case of Phelps, the indictment is not set forth, it no doubt charged assaults by Phelps on the deceased by blows like the second count in this indictment; in that case there can be no doubt that the proof of such blows was offered and received in evidence to prove the felony; in that case, as in this, the evidence must have been given, not to prove the *animus* merely, but the very act of felony; in that case, as in this, the assault so charged was proved; and in that case, as in this, the jury might have found that the deceased died of the blows given by Phelps, though others afterwards struck him; but in that case, as in this, the assault was disconnected from the death, which arose in both cases from the act of persons unknown. In the present case, as soon as the medical evidence referred the death to a blow inflicted by some person unknown, shortly before the 4th of January, 1850, assaults committed in the preceding November were at least as much disconnected from the death as assaults committed by Phelps on the same day upon which the death occurred. *Reg. v. Birch* is an authority entitled to the greatest respect, as being, like the case of Phelps, the unanimous decision of the judges, and containing a development of the rule, which, in the opinion of those judges,

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should govern this class of cases; but I think that, rightly considered, neither the decisions as applied to the facts of that case, nor its enunciation of principle, militates against the present conviction. The indictment charged a robbery with violence, the prisoner was seen with others on the night in question to strike the prosecutor several blows, but the proof of robbery failed; the jury found the prisoner guilty of assault under the statute, and the judges held the conviction right.

Here the very transaction indicted, and which included an assault, was proved, but it was found not to amount to felony, one of the cases clearly contemplated by the statute. How does this show that a party can be convicted of an assault not associated with "the very act or transaction," that transaction being, in verity, the death charged, but produced by other means? The judges, on this occasion, considered the learned note in Mr. Greaves's edition of "Russell on Crimes," in which he seeks to confine the operation of the statute to cases of inchoate felony, which (with the highest respect for the learning of that excellent writer) is wholly untenable, as it would exclude the cases to which the statute was primarily intended to apply when the act is complete, but the felonious intention wanting. They there lay down the rule "that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault; but in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also the part of the very act or transaction on which the crown prosecutes as a felony by indictment. This rule disposes of the construction that the charging an assault in the indictment is sufficient to warrant the finding of guilty of assault where an assault is proved; and, taking the first clause in connection with the last, it seems to me to refer the words, "the very act and transaction" of which it speaks, not to the matter charged in the indictment, but to the act itself, that is, in this case, the death, which is the sole subject of prosecution, and which depends not on the opening or motive of counsel, but on the entire proof in the case when developed before the jury. If this view of the case in judgment as applied to the statute is correct, the summing up of the learned judge presented the only question which could be raised properly to the jury. It is to be remembered that a plea of previous acquittal of felony, pleaded to an indictment for assault, is not like an ordinary plea of *autrefois acquit* of murder to another indictment of murder, and where the prisoner has nothing to prove but the identity of the prisoner and of the party whose death is charged as murder, to establish his plea. But, it being conceded that there are cases in which an indictment for felony includes an assault, and on the trial of which an assault is proved, and yet on which the prisoner cannot lawfully be convicted of an assault, and, therefore, is not in jeopardy of such conviction, it must on every such plea be matter of proof whether the prisoner could have been convicted of assault before; and that depends upon

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the question raised by the rule in *Birch's Case*, whether the assault charged in the second indictment is part of "the very act or transaction" prosecuted on the first. This, the assaults secondly charged on the prisoners were not, unless they were part of the felony, death, which was the subject of the former charge; and in putting the question whether they conduced in any way to the death, the learned judge put the question in the manner most favorable to the prisoners. It is true that when the evidence of the surgeon given on the first trial was read, and was repeated by them on the second, the "prisoners," as observed by the learned counsel, "had no chance of success;" but this was because the facts afforded no ground out of which such chance could justly arise. On the whole, therefore, I think that the construction contended for by the prisoners' counsel, not being accordant with the object of the statute, nor justified by the language of the statute, nor founded on any intelligible principle, ought not to prevail. It would lead to the consequence of enabling a prosecutor or his counsel to deepen the responsibility of an offender, whose offence might be most trivial, by the form of the indictment and the course of evidence, so that a man indicted for murder against whom, in the course of the proceeding, an assault committed by him long before the death might be relevantly proved, might be acquitted of the murder on proof that it was committed by another, and, in addition to the calamity of being tried for the capital crime, of which he is guiltless, be liable by reason of that calamity to be visited with solitary imprisonment or hard labor. It is true that the discretion which, on such conviction, belongs to the court is not likely to be abused; and it is also true that it may sometimes be extremely convenient that such discretion should exist, as in the present case, where, on failure of the greater charge, an immediate punishment of proved criminality is expedient for the ends of justice. But, believing that the legislature never intended to invest the court with such discretion in such a case, considering that the rule of law now to be defined or maintained may apply to cases entirely dissimilar in moral character to the present, and in which a discretion extended by mere accident may work most serious liabilities, which the law never contemplated, I adhere to the opinion which, on imperfect materials, I formed at the trial. Lamentable as it would be if the prisoners shall obtain impunity by the success of opposite positions, averting a conviction of assault on the first trial by successfully contending that it could not take place, on the very ground that the assaults proved did not conduce to the death charged, and succeeding afterwards by arguing that they might have been so convicted, they must, if they are now right, have the benefit of the error. But I think the prisoners' counsel were right in their contention on their first trial, and if so, the present conviction is right.

WILLIAMS, J. In this case the prisoners in substance allege in the plea, which they were put to prove by the replication, that they were legally acquitted on a former indictment of the assaults charged against them by the present indictment. And as it is plain that they

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could not have been legally acquitted of the assaults unless they were in peril of being legally convicted of them, the question resolves itself into the inquiry whether, on the former trial, the prisoners could have been legally convicted of all the assaults charged by the present indictment, and I am of opinion that they could not. It cannot be doubted that this question depends altogether on the operation of the stat. 1 Vict. c. 85, s. 11. Before that statute, although the general rule was, that it was not necessary to prove the crime charged by an indictment to the whole extent laid, it being sufficient for the prosecutor to prove so much of the charge as constituted an offence punishable by law, yet this rule was undoubtedly subject to the qualification, that if a prisoner were indicted for a felony, he could not be convicted for a misdemeanor on that indictment. But by the statute in question, it is enacted, that "on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The language here employed appears to me to show that the statute did not intend that the person charged with a felony, including an assault, should be regarded in any event as charged with the offence of assault in addition to the crime of felony imputed by the indictment, but meant only that the portion of the crime of the imputed felony which consists of the offence of assault, shall, *per se*, be a subject of conviction and punishment, if it be proved that the prisoner is guilty of that portion, and of that portion only. If, therefore, it shall be proved that some person has been guilty of the whole of the imputed felony, including therein necessarily the imputed assault, but the evidence fails to implicate the prisoner in any portion of that guilt, he must, in my judgment, be wholly acquitted. The felony charged by the former indictment in the present case, was homicide by violence to the person of Mary Ann Parsons. The crime charged, therefore, included an assault. It was proved that her death had been caused exclusively by a blow on the head, inflicted shortly before her death; but there was no evidence to show that that blow had been struck by either of the prisoners. It was therefore proved that the assault, and every other portion of the imputed homicide, had been committed by some person unknown, but the prisoners were not implicated in any part of the guilt. It seems, therefore, to me that they could not be convicted of any part of it, but were entitled to a general acquittal. But it is said that this view of the case is at variance with the decision of all the judges in *Reg. v. Birch*. In that case the prisoner was indicted for feloniously assaulting one Charles Darley, putting him in bodily fear, and feloniously and violently stealing from his person a watch and other property. The prosecutor did not appear, and the proof as to the felony failed. But it was proved that on the night in question the prisoner struck the prosecutor several times about the head while he was lying on the ground. The jury found the prisoner guilty of an assault only, not being satisfied that it was with intent to rob. And it was held by

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eleven judges, on a case reserved, that the conviction for the assault was right under the stat. 1 Vict. c. 85, s. 11. But it must be observed that in this case it was not proved that any one had been guilty of the imputed robbery. The crown failed altogether either to prove an assault with intent to rob, or steal from the person of the prosecutor, and established only one portion of the crime of robbery, viz., that which consisted of the assault *simpliciter*, and of that portion the prisoner was guilty. It does not follow from this decision, that if it had been proved that some one unknown had been guilty of the felony charged and the assault included therein, (but that the prisoner was not at all implicated in any part of this guilt,) the judges would have held a conviction for assault to be warranted by the statute. In truth, they could hardly have so held without overruling the decision of *Reg. v. Phelps*, which they do not at all appear to have intended to do. In that case the prisoner was indicted, with others, for the murder of John Overbury. It was proved at the trial that in a scuffle the prisoner struck Overbury once or twice, and knocked him down. The prisoner afterwards went home and took no further part in the affray, and shortly afterwards Overbury was again assaulted and killed by some other persons, who could not be identified; and there was no distinct evidence to connect the second assault with the prior assault by the prisoner. The jury acquitted him of the felony, but found him guilty of an assault. The judges, however, in a case reserved, thought that the conviction was wrong. But it has been argued that this view of the case is, at all events, at variance with the definition given by the judges, in *Reg. v. Birch*, of the requisites of an assault for which a conviction may take place under the statute, inasmuch as the judges, in effect, resolved in that case that it is only requisite that the assault shall be included in the charge on the face of the indictment, and also, "be a part of the very act or transaction which the crown prosecutes as a felony by the indictment." And it is said that, in the present case, the "act or transaction" which the crown prosecuted as a felony on the former indictment must, on the facts stated in the case reserved, be regarded as having consisted of the homicide of Mary Ann Parsons by means of the very assaults which are charged by the latter indictment. But why must the crown be thus regarded as having "prosecuted these assaults"? The counsel for the crown, it is true, stated them in his opening address as conducing to the death, adding, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. And the evidence afterwards given on behalf of the crown undoubtedly included evidence of these assaults. But these circumstances fail altogether, in my judgment, to establish that the assaults in question were "part of the very act or transaction which the crown prosecuted as a felony." That "act or transaction" was, I conceive, the homicide of Mary Ann Parsons, including necessarily the violence which caused her death, whatever it might be. And, in my opinion, as soon as it appeared by the evidence that a homicide had taken place, the assault which caused the death, and no other assault, became, necessarily, from the mere nature of the prosecution,

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identified as the assault which the crown was prosecuting as part of, and included in, that felony. If there had been any evidence that the prisoners were guilty of that assault, surely the case must have been left for the consideration of the jury exclusively of the other assaults. For if the jury were directed, first, to consider whether the prisoners were guilty of the assault which caused the death, and consequently of the felony; and, secondly, in case they, the jury, acquitted of the felony, to consider whether the prisoners had been guilty of the assaults which did not conduce to the death, this would, in effect, be treating the prosecution as if it were an indictment for assault, and also for a felony including an assault; which, both by *Phelps's Case* and the resolution in *Birch's Case*, is demonstrated to be wrong. The same difficulty would occur if there had been evidence to implicate one only of the prisoners in the mortal assault. Could the jury in such a case have been properly directed to have considered the crown as prosecuting the mortal assault as against one of the prisoners, and the assaults which did not conduce to the death as against the other prisoner? In the present instance, it is true, the case was stopped, and no case at all left to the jury; but this makes no difference, in my opinion; for whether a jury acquit in accordance with the view taken by the judge, because there is no evidence against the prisoner, or because the evidence is not satisfactory, in either case they, in truth, acquit for want of sufficient evidence to convict. It is manifestly fallacious to make the opening of counsel the test on the question of what is "the act or transaction which the crown prosecutes." It is plain that the court is not at all bound by the statements made by the counsel in his address. Suppose, in the present case, the counsel had stated that the last blow was the mortal one, and he should only give the preceding blows in evidence as proof of the *animus* of the prisoners, and it had turned out on the evidence that one of the preceding blows was the mortal one, and the last one had not at all conduced to the death, could the prisoners have claimed an acquittal of the felony, notwithstanding it was proved that they had inflicted the mortal blow? Again: suppose the counsel, in his opening, had omitted in his statement that the assaults now in question conduced to the death, and had merely mentioned them as proof of the *animus* of the prisoners, then, by the application of this test, (though the evidence would have been exactly the same,) these assaults could not have formed a part of the "act and transaction which the crown prosecuted," and the prisoners could not have been convicted of them. The test can hardly be a sound one which thus makes the liability of a prisoner to more severe punishment depend on the inadvertence or discretion of counsel, or the accident whether the evidence for the crown is or is not prefaced by an address from an advocate. The material point of time is, I think, at the close of the evidence, when the judge has to perform the duty of telling the jury as to what part of the indictment there is a case for their consideration. At that point of time, at the trial of the former indictment in the present case, it had been proved by the evidence for the crown, that the homicide imputed by the indictment, including an assault,

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had been committed. In my opinion, this demonstrated, *per se*, that the act or transaction which the crown was prosecuting was the homicide which thus appeared to have been committed; consequently, I think the prisoners could not have been legally convicted under the statute of any assault which was not included in that transaction; in other words, which did not conduce to the death. I may add, that it seems to be impossible to come to a different conclusion without overruling *Reg. v. Phelps*; for overruling which case I have found no good reason. The question remains, whether the conviction on the present indictment was wrong by reason of the mode in which the case was left to the jury. I incline to think that the summing up was not strictly correct. For, notwithstanding that the assaults did not in any way conduce to the death of the deceased, the prisoners might have been in jeopardy of being convicted of them on the former indictment, but for the proof that some one, unknown, had committed the homicide charged against the prisoners, which demonstrated that these assaults were not any part of the transaction which the crown was prosecuting. The question, therefore, which was submitted to the jury was not conclusive of the issue. It would have been so if the ruling in *Reg. v. Crumpton* (which the learned judge appears to have followed) were law. But I consider that case to have been, in effect, overruled by *Birch's Case*. Still, I am of opinion that the conviction was right. I think the learned judge correctly laid down that the burden of proof lay on the prisoners, who were to establish the truth of their plea. Now, this could only be done by proving that they were in jeopardy, on the former indictment, of being convicted of all the assaults included in the latter. But the evidence adduced (as it is stated in the case reserved) showed, according to the view I have taken of the operation of the statute, that they were not in such jeopardy. I think, therefore, that they failed in proof of their plea, and that they were properly convicted.

ERLE, J. In this case the question turns upon the construction of the statute 1 Vict. c. 85, s. 11. The words of that statute indicate that the assault in the conviction should be the assault included in the supposed felony, and the cases decide that a conviction for an assault, unless included in the felony in law as connected therewith in fact, would be wrong. Thus, upon a charge of felony in attempting to discharge a loaded pistol, an assault by blows not involved in or connected with the presentation of the pistol was held not to be included by law in the charge. *Reg. v. St. George*, 9 Car. & P. 483. So, where an indictment for a burglary with an intent to ravish contained a charge of an assault by blows, this assault was held not to be included by law in such a charge of burglary. *Reg. v. Watkins*, Car. & M. 264. So, where upon a charge of rape it was proved that the prisoner assaulted at one time, and that another man committed the felony at another time, the assault by the prisoner at a different time was held not to be connected in fact with the crime charged. *Reg. v. Gutteridge*, 9 Car. & P. 471. So, upon a charge of murder, an assault upon a different time from that when the fatal blow was

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given was held not to be connected with the crime charged. *Reg. v. Phelps and others*, 1 Russell, 781. Also, where, upon the same charge of murder, there was some evidence that the prisoners were coöperating in the beating that caused the death, it was left to the jury to say in effect whether the acts of the prisoners had conduced to the death. If yes, the prisoners were guilty of felony; if no, they were not guilty altogether; the evidence of the assault being equally evidence to prove the felony. *Reg. v. Phelps, Southan and Smith*, 1 Car. & M. 180. According to these decisions, the summing up of the learned judge now under consideration was correct, and his construction of the statute does not conflict with the principle which the judges laid down in the case of *Reg. v. Birch*, 1 Denison, 185, with reference to the facts then before them, viz., that the assault intended by the statute must be included in the indictment, and must be part of the transaction which is prosecuted as a felony. In that case there was evidence of the prosecutor having been assaulted and robbed, and of the prisoner having taken part in the transaction when the assault and supposed robbery occurred; but the proof of the robbery was, in the opinion of the jury, imperfect. Under these circumstances, a conviction for an assault, which upon the evidence might have been a part of the felony charged, was supported. In the present case, the cause of death being proved, and the assaults by the prisoner, which were in evidence, being also proved to be no part of the cause of death, and the cause of death being the transaction which is prosecuted as a felony, it seems to me that the assaults cannot be truly said to have been part of the transaction which is so prosecuted. The intention of the prosecutor to include them in the indictment is not alone sufficient to support a conviction, because that intention existed in the cases where the convictions were excluded. It is further to be observed, that there is a distinction between the charge of assault in cases of rape, robbery, and felonious wounding, and that in cases of homicide by assault. In the first class, the charge relates to one transaction which is probably a felony, and the assault in question is a part of that transaction, and has its felonious character at the time of its committal. In the second class, upon a charge of homicide by assault, the essence of the crime is causing death: the felonious nature of the assault arises from the retrospective effect of death; and in many cases of homicide the felony is equally complete whether death was within the intention of the prisoner at the time of the assault or not. If the assaults and death stand in the relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for a conviction under the statute. According to this reasoning the statute would not come into operation in cases of homicide by assault, and I believe it was not intended that it should. But if, after the decision, this reasoning is not adopted to the full extent, still the interests of public justice seem to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, and where the death is attributed to a single occasion of assault, so as to be within

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the principle laid down in *Reg. v. Phelps*. It is important for public justice to conduct trials for murder with unity of attention, to free the judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives—murder, assault, and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence; the death may be attributed in various counts to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conducted to the death, and the prisoner is to be acquitted of felony, it is contended that he must then be acquitted of all the assaults which have been proved; but the legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial: and the trial would not appear to me to be fair, if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation. The purpose of the statute was to prevent the delay and trouble of a second indictment for assault. In cases of homicide by several assaults, that saving would be effected by a sacrifice of justice, and that construction of the statute is to be adopted which most avoids this inconvenience. The learned judge adopted the construction of the statute which gives it this restricted application, and his summing up is objected to on that account. But, upon the grounds above stated, the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESSWELL, J. The question now to be determined arises out of the enactment in 1 Vict. c. 85, s. 11, "that on the trial of any person for any felony whatever, wherever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The crime charged means the *felony* charged, and that must be of such a nature that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within the section by an express averment that an assault was committed. If the question were a new one, and I had been called upon to construe the enactment without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only where an attempt had been made to commit a felony, which had not been perfected; and, in making the attempt, an assault had been committed. But it has been held that the statute ought not to have so limited a construction, and that a party indicted for robbery may be acquitted of that felony and found guilty of assault, although the jury negative any intention or attempt to rob.

On the other hand, it has been held that the enactment ought not to have the widest application of which the words used are capable,

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but that the assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the "very act or transaction which the crown prosecutes as a felony," by the indictment. Those two points were ruled by the unanimous opinion of the judges, in *Reg. v. Birch and another*, 1 Den. 185. That case having been so decided, it is, in my judgment, much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the criminal law uncertain, by reopening a question which has been decided by the whole body of judges. If the decision of the whole body pronounced one year may be overturned the next, that reversal may again be overturned the following year; and such a course of proceeding would bring the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *Reg. v. Birch and another*, and hold that the assault of which a party may be convicted, under the 1 Vict. c. 85, s. 11, must be part of the "very act or transaction which the crown prosecutes as a felony," but that it need not be committed in attempting to commit the felony charged. The matter to be determined in the present case then is, whether the assaults for which the Birds were indicted and tried before the learned judge, who has reserved this case for consideration, were part of that act or transaction which the crown prosecuted as a felony before my brother Talfourd on a former occasion. If they were part of that transaction, the prisoners might have been convicted, and they cannot be tried a second time for the same offence; otherwise the present conviction is right.

On this part of the case, also, I have a decision of the whole body of judges to guide me, for I cannot distinguish the case of *Reg. v. Phelps*, 2 Moo. Cro. C., reported also in 1 Russ. by Mr. Greaves, from the present. In that case, Phelps was indicted, together with two others, Southan and Smith, for the murder of Overbury, by blows. Evidence was given that Phelps had struck the deceased more than once, and knocked him down; but other evidence was also given, which showed that those strokes were not the cause of death, and that Phelps had gone away a quarter of an hour or more before the blow was given to which the death of the deceased was ascribed. The late Mr. Justice Coltman told the jury that there was no evidence to support the charge of murder against Phelps, but that they might find him guilty of assault, which they accordingly did. The case was left to the jury on the charge of murder as to the other two prisoners, and they were altogether acquitted. The propriety of the conviction of Phelps was reserved for the opinions of the judges, who held that, as the assault proved did not form a constituent part of the greater charge of felony, but was a distinct and separate assault, the conviction was wrong. They therefore decided that the assault so committed by Phelps was not part of the "act or transaction" which the crown prosecuted as a felony by that indictment. Here, the Birds were shown to have committed various assaults; but the evidence negatived their being the cause of the death of Mary Ann Parsons, which was ascribed to a blow inflicted at a subsequent time, and the party who inflicted it could not be ascertained; whereupon the judge

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told the jury, and in my opinion rightly, that there was no evidence to establish the charge of murder against the prisoners, and the evidence then given showed that the assaults proved to have been committed by the Birds were not part of the act or transaction prosecuted in that case. Feeling, therefore, that the case of *Reg. v. Phelps* cannot be distinguishable from the present, and that it was decided by the whole body of judges for the reason given above, I should think it right to act upon it as a binding authority, even if I doubted the propriety of the decision; but it seems to me to be correct. The "act or transaction," which the crown prosecuted by the indictment for murder preferred against the Birds, was the act of killing Mary Ann Parsons, "of malice aforethought, by blows." The indictment did not describe the particular blows by which the death was occasioned, and it was competent to the crown to give evidence of any blows given by the prisoner, and to endeavor to show that they were the cause of death. But still the "transaction" prosecuted was the death, and the means by which it was occasioned, and when the evidence showed that the death was occasioned by a particular blow, and that the others before proved were not part of the same transaction, but wholly distinct and independent of it, the judge who tried the prisoners was bound to withdraw them from the consideration of the jury on the charge of murder, and, as in *Phelps's Case*, a conviction of those assaults would have been wrong. Nor can I discover that this view of the subject is inconsistent with *Reg. v. Birch*, and other cases, where it has been held that although the evidence fails to show that the supposed felony prosecuted by the indictment has been committed at all, nevertheless the party charged may be convicted of an assault, for it may be ascertained by evidence what is the transaction really prosecuted; *exempli gratia*, indictment for rape, evidence of assault, indecent liberties, an apparent attempt to commit the crime charged, but no completion of it. The transaction is ascertained, and an assault being part of it, comes within 1 Vict. c. 85, s. 11. So in the case of an indictment for robbery, as in *Reg. v. Birch*, if there were evidence of one assault and nothing more, that would appear to be the transaction prosecuted. But assume the evidence to be of an assault, and afterwards another and independent assault, and on this latter occasion money lost, the latter would appear to be the real transaction prosecuted, and the party, if acquitted of the latter transaction, could not be found guilty of the first and independent assault. I think, therefore, that, upon principle and authority, I am bound to say that the present conviction is right.

WIGHTMAN, J. The question in this case, in substance is, whether the prisoners upon their trial before my brother Talfourd, on an indictment which charged them with murder, could have been found guilty under the 11th section of 1 Vict. c. 85, of an assault charged against them by the indictment subsequently preferred against them, and to which they have pleaded *autrefois acquit*. The words of the statute are, "Be it enacted, that on the trial of any prisoner for any of the offences hereinbefore mentioned, or for any felony whatever, where the

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crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." It is perfectly clear that this clause was not intended to apply to any assault in fact proved against the prisoner upon a trial for felony, including assaults though totally unconnected in time, place, or circumstance, with the felony charged; and from the time of the passing of the statute, its application has come into question in a great many cases, and there are *dicta* and decisions of individual judges which it is not easy, and which, indeed, it may be impossible, wholly to reconcile. But I do not think it necessary or expedient to refer to more than four cases, two of which have come under the consideration of all the judges, and two others of which, though only expressing the opinion of individual judges, agree so exactly, it appears to me, in principle, as to the instances in which the statute may be applied, with the two cases that have come before all the judges, that I cite them as additional authorities for the construction to which I have arrived in the present case. The cases to which I refer are *Reg. v. Phelps*, and *Reg. v. Birch*, before all the judges; and *Reg. v. St. George*, before my brother Parke; and *Reg. v. Crumpton*, before my brother Patteson. These cases, differing in some respects and circumstances, all agree in the principle upon which the statute is to be applied, that prisoners could only be found guilty under the act of Parliament of the immediate act which was involved in and formed part of the act or transaction which was charged as a felony in the indictment. This, indeed, was stated in terms by my brother Parke, in the case of *Reg. v. St. George*, in which he referred to the former case of *Reg. v. Gutteridge*, to the same effect, and to the opinion of my brother Patteson in *Reg. v. Crumpton*, and is the opinion of all the judges expressed in *Reg. v. Birch*, and *Reg. v. Phelps*. Assuming, then, that the principle upon which the question whether prisoners charged with felony, including an assault, can be acquitted of the felony and be convicted of the assault is settled by the cases to which I have referred, it only remains to apply that principle to the present case. The prisoners are charged upon this indictment with the murder of Mary Ann Parsons, by beating and striking at different times, as stated in the indictment. The act or transaction charged against them as a felony was the assaulting and beating, which caused the death of Mary Ann Parsons. The death was proved by the prosecutor to have been wholly caused by a blow given very shortly before or on the 4th of January, 1850, but as there was no evidence that that blow was inflicted by either of the prisoners, they were acquitted of the felony with which they were charged; but it was proved in the course of the trial, that, on several days and occasions before the day when the fatal blow was given, the prisoners had assaulted and beaten the deceased; but those assaults were quite distinct and independent of the act or transaction which caused the death, which was the felony charged. It is true that the felony is charged to have been committed by beating, and that the deceased did die by beating, and that the prisoners were proved to have beaten her; but the assaults and beat-

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ings proved against them did not form part of the act or transaction which was charged as a felony in the indictment, (which was the assault or beating which actually caused the death,) as appeared by the evidence in support of the charge of felony against the prisoners. The crown prosecuted in respect of the assaults and blows which caused the death, and they proved that, at the particular time, a blow was inflicted by some one which did cause the death of the deceased. It was that blow, and that blow only, which caused the death, and was in fact, as appeared by the evidence before the court, the act which was charged as felonious. The prisoners were not proved to have committed that act; nor were any of the assaults or beatings proved against them, nor were they a part of the transaction which the crown proved to be the cause of the death. They were therefore not involved in, nor did they form part of, the act or transaction which was charged as felony in the indictment. In the case of *Reg. v. Birch and others*, the prisoners were indicted for feloniously assaulting and robbing the prosecutor with violence. The evidence proved that the prosecutor was attacked by several persons, and knocked down, and that the prisoner was seen to strike him while upon the ground, with other persons about him, also misusing him; but, by reason of the absence of the prosecutor, the charge of felony was not supported, but the prisoner was convicted of assault under the statute, and they held rightly, because the assault formed part of, and was involved in, the act or transaction which was charged as a felony in the indictment. It was clear that it was then, at that time, that the felony charged in the indictment was committed, if committed at all, and the assault formed part of that transaction, and was involved in it. The distinction between that and the present case appears to me most clear. If in the present case it had appeared that at the time the mortal injury was received the prisoners were with the deceased, and had assaulted and beaten her immediately before the death, if that evidence raised a doubt whether the mortal injury was occasioned by the blows then inflicted by the prisoners, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of the felony, I should think that they might have been convicted of assault under the statute; for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as a felony in the indictment, and prosecuted as connected with it. Though the evidence failed to establish it as a felony, it was the only transaction which was intended to be charged as such. If that was not felonious, in that case there would be no other, for the assaults in question were wholly unconnected with the intent of the transaction, which was proved on the part of the prosecution to have caused the death of the deceased, and which was the felony charged against the prisoners, and of which they might have been found guilty if they could have been proved to have been acting in it. I may observe that the issue taken by the replication to the plea of *autrefois acquit* is, that the prisoners were not upon the former trial acquitted of the felony of murder, including the same identical assaults charged in the second indictment. For the reasons I have given, it appears to me

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that the felony of murder charged in the first indictment did not include the same identical assaults charged in the second indictment. The learned commissioner, in charging the jury, told them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown. This, perhaps, is hardly correct in part, as the question is not whether the assault actually conducing to the death of the deceased, but whether it was part of the very act or transaction which was charged as felony in the indictment. But this is not a case for a new trial; and the question substantially is whether, notwithstanding the defect, if it be one, the verdict is, under all the circumstances, right. The charge of the learned commissioner, directing the jury to the main point, whether the assaults were distinct and independent assaults, clearly meaning distinct and independent of that which was involved in, and formed part of, the act or transaction charged as felony by the prosecution, seems to me to be perfectly correct to that extent, and it would be too much to set aside a verdict fully warranted by evidence, because, upon a critical examination of the judge's charge, there may have been a partial defect, the charge in substance being correct. Upon the whole, therefore, I am of opinion that the prisoners could not, consistently with the principle which I have already stated, have been convicted upon the first indictment of those assaults which were the subject of the second, and that the verdict which has been found for the crown is right.

COLERIDGE, J. I have considered this case with all the attention which the known conflict of opinions upon it among the judges made it proper for me to bestow, and although I cannot say that I have arrived at a conclusion free from all doubt, yet upon the whole I think that the conviction was right. The question depends on the true construction to be put upon the words of the statute, that at "the trial of any person for any felony whatsoever, whenever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." These words are very general, and yet as justice requires, so I think from the very words, if closely examined, some limitations will be found clearly implied upon their generality, and these it will be right to point out. First, I remark the change of language from "felony" to "crime charged;" the first points to the species, the second to the individual case, and that case must be "charged," that is, expanded in statement on the indictment. The statute, therefore, applies only where the individual crime, being a felony in itself involving an assault, shall, as it is charged on the face of the indictment, include an assault on the person, and the whole charge will be compounded of the assault, and all those circumstances, whether of act, intent, or consequences, which go to make the felony complete; these, with the former, altogether make one whole. The statute then proceeds to say, that in such case the jury may "acquit of the

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eleven judges, on a case reserved, that the conviction for the assault was right under the stat. 1 Vict. c. 85, s. 11. But it must be observed that in this case it was not proved that any one had been guilty of the imputed robbery. The crown failed altogether either to prove an assault with intent to rob, or steal from the person of the prosecutor, and established only one portion of the crime of robbery, viz., that which consisted of the assault *simpliciter*, and of that portion the prisoner was guilty. It does not follow from this decision, that if it had been proved that some one unknown had been guilty of the felony charged and the assault included therein, (but that the prisoner was not at all implicated in any part of this guilt,) the judges would have held a conviction for assault to be warranted by the statute. In truth, they could hardly have so held without overruling the decision of *Reg. v. Phelps*, which they do not at all appear to have intended to do. In that case the prisoner was indicted, with others, for the murder of John Overbury. It was proved at the trial that in a scuffle the prisoner struck Overbury once or twice, and knocked him down. The prisoner afterwards went home and took no further part in the affray, and shortly afterwards Overbury was again assaulted and killed by some other persons, who could not be identified; and there was no distinct evidence to connect the second assault with the prior assault by the prisoner. The jury acquitted him of the felony, but found him guilty of an assault. The judges, however, in a case reserved, thought that the conviction was wrong. But it has been argued that this view of the case is, at all events, at variance with the definition given by the judges, in *Reg. v. Birch*, of the requisites of an assault for which a conviction may take place under the statute, inasmuch as the judges, in effect, resolved in that case that it is only requisite that the assault shall be included in the charge on the face of the indictment, and also, "be a part of the very act or transaction which the crown prosecutes as a felony by the indictment." And it is said that, in the present case, the "act or transaction" which the crown prosecuted as a felony on the former indictment must, on the facts stated in the case reserved, be regarded as having consisted of the homicide of Mary Ann Parsons by means of the very assaults which are charged by the latter indictment. But why must the crown be thus regarded as having "prosecuted these assaults"? The counsel for the crown, it is true, stated them in his opening address as conducing to the death, adding, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. And the evidence afterwards given on behalf of the crown undoubtedly included evidence of these assaults. But these circumstances fail altogether, in my judgment, to establish that the assaults in question were "part of the very act or transaction which the crown prosecuted as a felony." That "act or transaction" was, I conceive, the homicide of Mary Ann Parsons, including necessarily the violence which caused her death, whatever it might be. And, in my opinion, as soon as it appeared by the evidence that a homicide had taken place, the assault which caused the death, and no other assault, became, necessarily, from the mere nature of the prosecution,

identified as the assault which the crown was prosecuting as part of, and included in, that felony. If there had been any evidence that the prisoners were guilty of that assault, surely the case must have been left for the consideration of the jury exclusively of the other assaults. For if the jury were directed, first, to consider whether the prisoners were guilty of the assault which caused the death, and consequently of the felony; and, secondly, in case they, the jury, acquitted of the felony, to consider whether the prisoners had been guilty of the assaults which did not conduce to the death, this would, in effect, be treating the prosecution as if it were an indictment for assault, and also for a felony including an assault; which, both by *Phelps's Case* and the resolution in *Birch's Case*, is demonstrated to be wrong. The same difficulty would occur if there had been evidence to implicate one only of the prisoners in the mortal assault. Could the jury in such a case have been properly directed to have considered the crown as prosecuting the mortal assault as against one of the prisoners, and the assaults which did not conduce to the death as against the other prisoner? In the present instance, it is true, the case was stopped, and no case at all left to the jury; but this makes no difference, in my opinion; for whether a jury acquit in accordance with the view taken by the judge, because there is no evidence against the prisoner, or because the evidence is not satisfactory, in either case they, in truth, acquit for want of sufficient evidence to convict. It is manifestly fallacious to make the opening of counsel the test on the question of what is "the act or transaction which the crown prosecutes." It is plain that the court is not at all bound by the statements made by the counsel in his address. Suppose, in the present case, the counsel had stated that the last blow was the mortal one, and he should only give the preceding blows in evidence as proof of the *animus* of the prisoners, and it had turned out on the evidence that one of the preceding blows was the mortal one, and the last one had not at all conduce to the death, could the prisoners have claimed an acquittal of the felony, notwithstanding it was proved that they had inflicted the mortal blow? Again: suppose the counsel, in his opening, had omitted in his statement that the assaults now in question conduce to the death, and had merely mentioned them as proof of the *animus* of the prisoners, then, by the application of this test, (though the evidence would have been exactly the same,) these assaults could not have formed a part of the "act and transaction which the crown prosecuted," and the prisoners could not have been convicted of them. The test can hardly be a sound one which thus makes the liability of a prisoner to more severe punishment depend on the inadvertence or discretion of counsel, or the accident whether the evidence for the crown is or is not prefaced by an address from an advocate. The material point of time is, I think, at the close of the evidence, when the judge has to perform the duty of telling the jury as to what part of the indictment there is a case for their consideration. At that point of time, at the trial of the former indictment in the present case, it had been proved by the evidence for the crown, that the homicide imputed by the indictment, including an assault,

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had been committed. In my opinion, this demonstrated, *per se*, that the act or transaction which the crown was prosecuting was the homicide which thus appeared to have been committed; consequently, I think the prisoners could not have been legally convicted under the statute of any assault which was not included in that transaction; in other words, which did not conduce to the death. I may add, that it seems to be impossible to come to a different conclusion without overruling *Reg. v. Phelps*; for overruling which case I have found no good reason. The question remains, whether the conviction on the present indictment was wrong by reason of the mode in which the case was left to the jury. I incline to think that the summing up was not strictly correct. For, notwithstanding that the assaults did not in any way conduce to the death of the deceased, the prisoners might have been in jeopardy of being convicted of them on the former indictment, but for the proof that some one, unknown, had committed the homicide charged against the prisoners, which demonstrated that these assaults were not any part of the transaction which the crown was prosecuting. The question, therefore, which was submitted to the jury was not conclusive of the issue. It would have been so if the ruling in *Reg. v. Crumpton* (which the learned judge appears to have followed) were law. But I consider that case to have been, in effect, overruled by *Birch's Case*. Still, I am of opinion that the conviction was right. I think the learned judge correctly laid down that the burden of proof lay on the prisoners, who were to establish the truth of their plea. Now, this could only be done by proving that they were in jeopardy, on the former indictment, of being convicted of all the assaults included in the latter. But the evidence adduced (as it is stated in the case reserved) showed, according to the view I have taken of the operation of the statute, that they were not in such jeopardy. I think, therefore, that they failed in proof of their plea, and that they were properly convicted.

ERLE, J. In this case the question turns upon the construction of the statute 1 Vict. c. 85, s. 11. The words of that statute indicate that the assault in the conviction should be the assault included in the supposed felony, and the cases decide that a conviction for an assault, unless included in the felony in law as connected therewith in fact, would be wrong. Thus, upon a charge of felony in attempting to discharge a loaded pistol, an assault by blows not involved in or connected with the presentation of the pistol was held not to be included by law in the charge. *Reg. v. St. George*, 9 Car. & P. 483. So, where an indictment for a burglary with an intent to ravish contained a charge of an assault by blows, this assault was held not to be included by law in such a charge of burglary. *Reg. v. Watkins*, Car. & M. 264. So, where upon a charge of rape it was proved that the prisoner assaulted at one time, and that another man committed the felony at another time, the assault by the prisoner at a different time was held not to be connected in fact with the crime charged. *Reg. v. Gutteridge*, 9 Car. & P. 471. So, upon a charge of murder, an assault upon a different time from that when the fatal blow was

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given was held not to be connected with the crime charged. *Reg. v. Phelps and others*, 1 Russell, 781. Also, where, upon the same charge of murder, there was some evidence that the prisoners were coöperating in the beating that caused the death, it was left to the jury to say in effect whether the acts of the prisoners had conduced to the death. If yes, the prisoners were guilty of felony; if no, they were not guilty altogether; the evidence of the assault being equally evidence to prove the felony. *Reg. v. Phelps, Southan and Smith*, 1 Car. & M. 180. According to these decisions, the summing up of the learned judge now under consideration was correct, and his construction of the statute does not conflict with the principle which the judges laid down in the case of *Reg. v. Birch*, 1 Denison, 185, with reference to the facts then before them, viz., that the assault intended by the statute must be included in the indictment, and must be part of the transaction which is prosecuted as a felony. In that case there was evidence of the prosecutor having been assaulted and robbed, and of the prisoner having taken part in the transaction when the assault and supposed robbery occurred; but the proof of the robbery was, in the opinion of the jury, imperfect. Under these circumstances, a conviction for an assault, which upon the evidence might have been a part of the felony charged, was supported. In the present case, the cause of death being proved, and the assaults by the prisoner, which were in evidence, being also proved to be no part of the cause of death, and the cause of death being the transaction which is prosecuted as a felony, it seems to me that the assaults cannot be truly said to have been part of the transaction which is so prosecuted. The intention of the prosecutor to include them in the indictment is not alone sufficient to support a conviction, because that intention existed in the cases where the convictions were excluded. It is further to be observed, that there is a distinction between the charge of assault in cases of rape, robbery, and felonious wounding, and that in cases of homicide by assault. In the first class, the charge relates to one transaction which is probably a felony, and the assault in question is a part of that transaction, and has its felonious character at the time of its committal. In the second class, upon a charge of homicide by assault, the essence of the crime is causing death: the felonious nature of the assault arises from the retrospective effect of death; and in many cases of homicide the felony is equally complete whether death was within the intention of the prisoner at the time of the assault or not. If the assaults and death stand in the relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected with the felony charged, and are no ground for a conviction under the statute. According to this reasoning the statute would not come into operation in cases of homicide by assault, and I believe it was not intended that it should. But if, after the decision, this reasoning is not adopted to the full extent, still the interests of public justice seem to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, and where the death is attributed to a single occasion of assault, so as to be within

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the principle laid down in *Reg. v. Phelps*. It is important for public justice to conduct trials for murder with unity of attention, to free the judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives — murder, assault, and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted, of course he should have full notice and opportunity for defence; the death may be attributed in various counts to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conducted to the death, and the prisoner is to be acquitted of felony, it is contended that he must then be acquitted of all the assaults which have been proved; but the legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial: and the trial would not appear to me to be fair, if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation. The purpose of the statute was to prevent the delay and trouble of a second indictment for assault. In cases of homicide by several assaults, that saving would be effected by a sacrifice of justice, and that construction of the statute is to be adopted which most avoids this inconvenience. The learned judge adopted the construction of the statute which gives it this restricted application, and his summing up is objected to on that account. But, upon the grounds above stated, the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESSWELL, J. The question now to be determined arises out of the enactment in 1 Vict. c. 85, s. 11, "that on the trial of any person for any felony whatever, wherever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The crime charged means the *felony* charged, and that must be of such a nature that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within the section by an express averment that an assault was committed. If the question were a new one, and I had been called upon to construe the enactment without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only where an attempt had been made to commit a felony, which had not been perfected; and, in making the attempt, an assault had been committed. But it has been held that the statute ought not to have so limited a construction, and that a party indicted for robbery may be acquitted of that felony and found guilty of assault, although the jury negative any intention or attempt to rob.

On the other hand, it has been held that the enactment ought not to have the widest application of which the words used are capable,

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but that the assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the "very act or transaction which the crown prosecutes as a felony," by the indictment. Those two points were ruled by the unanimous opinion of the judges, in *Reg. v. Birch and another*, 1 Den. 185. That case having been so decided, it is, in my judgment, much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the criminal law uncertain, by reopening a question which has been decided by the whole body of judges. If the decision of the whole body pronounced one year may be overturned the next, that reversal may again be overturned the following year; and such a course of proceeding would bring the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *Reg. v. Birch and another*, and hold that the assault of which a party may be convicted, under the 1 Vict. c. 85, s. 11, must be part of the "very act or transaction which the crown prosecutes as a felony," but that it need not be committed in attempting to commit the felony charged. The matter to be determined in the present case then is, whether the assaults for which the Birds were indicted and tried before the learned judge, who has reserved this case for consideration, were part of that act or transaction which the crown prosecuted as a felony before my brother Talfourd on a former occasion. If they were part of that transaction, the prisoners might have been convicted, and they cannot be tried a second time for the same offence; otherwise the present conviction is right.

On this part of the case, also, I have a decision of the whole body of judges to guide me, for I cannot distinguish the case of *Reg. v. Phelps*, 2 Moo. Cro. C., reported also in 1 Russ. by Mr. Greaves, from the present. In that case, Phelps was indicted, together with two others, Southan and Smith, for the murder of Overbury, by blows. Evidence was given that Phelps had struck the deceased more than once, and knocked him down; but other evidence was also given, which showed that those strokes were not the cause of death, and that Phelps had gone away a quarter of an hour or more before the blow was given to which the death of the deceased was ascribed. The late Mr. Justice Coltman told the jury that there was no evidence to support the charge of murder against Phelps, but that they might find him guilty of assault, which they accordingly did. The case was left to the jury on the charge of murder as to the other two prisoners, and they were altogether acquitted. The propriety of the conviction of Phelps was reserved for the opinions of the judges, who held that, as the assault proved did not form a constituent part of the greater charge of felony, but was a distinct and separate assault, the conviction was wrong. They therefore decided that the assault so committed by Phelps was not part of the "act or transaction" which the crown prosecuted as a felony by that indictment. Here, the Birds were shown to have committed various assaults; but the evidence negatived their being the cause of the death of Mary Ann Parsons, which was ascribed to a blow inflicted at a subsequent time, and the party who inflicted it could not be ascertained; whereupon the judge

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told the jury, and in my opinion rightly, that there was no evidence to establish the charge of murder against the prisoners, and the evidence then given showed that the assaults proved to have been committed by the Birds were not part of the act or transaction prosecuted in that case. Feeling, therefore, that the case of *Reg. v. Phelps* cannot be distinguishable from the present, and that it was decided by the whole body of judges for the reason given above, I should think it right to act upon it as a binding authority, even if I doubted the propriety of the decision; but it seems to me to be correct. The "act or transaction," which the crown prosecuted by the indictment for murder preferred against the Birds, was the act of killing Mary Ann Parsons, "of malice aforethought, by blows." The indictment did not describe the particular blows by which the death was occasioned, and it was competent to the crown to give evidence of any blows given by the prisoner, and to endeavor to show that they were the cause of death. But still the "transaction" prosecuted was the death, and the means by which it was occasioned, and when the evidence showed that the death was occasioned by a particular blow, and that the others before proved were not part of the same transaction, but wholly distinct and independent of it, the judge who tried the prisoners was bound to withdraw them from the consideration of the jury on the charge of murder, and, as in *Phelps's Case*, a conviction of those assaults would have been wrong. Nor can I discover that this view of the subject is inconsistent with *Reg. v. Birch*, and other cases, where it has been held that although the evidence fails to show that the supposed felony prosecuted by the indictment has been committed at all, nevertheless the party charged may be convicted of an assault, for it may be ascertained by evidence what is the transaction really prosecuted; *exempli gratia*, indictment for rape, evidence of assault, indecent liberties, an apparent attempt to commit the crime charged, but no completion of it. The transaction is ascertained, and an assault being part of it, comes within 1 Vict. c. 85, s. 11. So in the case of an indictment for robbery, as in *Reg. v. Birch*, if there were evidence of one assault and nothing more, that would appear to be the transaction prosecuted. But assume the evidence to be of an assault, and afterwards another and independent assault, and on this latter occasion money lost, the latter would appear to be the real transaction prosecuted, and the party, if acquitted of the latter transaction, could not be found guilty of the first and independent assault. I think, therefore, that, upon principle and authority, I am bound to say that the present conviction is right.

WIGHTMAN, J. The question in this case, in substance is, whether the prisoners upon their trial before my brother Talfourd, on an indictment which charged them with murder, could have been found guilty under the 11th section of 1 Vict. c. 85, of an assault charged against them by the indictment subsequently preferred against them, and to which they have pleaded *autrefois acquit*. The words of the statute are, "Be it enacted, that on the trial of any prisoner for any of the offences hereinbefore mentioned, or for any felony whatever, where the

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crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." It is perfectly clear that this clause was not intended to apply to any assault in fact proved against the prisoner upon a trial for felony, including assaults though totally unconnected in time, place, or circumstance, with the felony charged; and from the time of the passing of the statute, its application has come into question in a great many cases, and there are *dicta* and decisions of individual judges which it is not easy, and which, indeed, it may be impossible, wholly to reconcile. But I do not think it necessary or expedient to refer to more than four cases, two of which have come under the consideration of all the judges, and two others of which, though only expressing the opinion of individual judges, agree so exactly, it appears to me, in principle, as to the instances in which the statute may be applied, with the two cases that have come before all the judges, that I cite them as additional authorities for the construction to which I have arrived in the present case. The cases to which I refer are *Reg. v. Phelps*, and *Reg. v. Birch*, before all the judges; and *Reg. v. St. George*, before my brother Parke; and *Reg. v. Crumpton*, before my brother Patteson. These cases, differing in some respects and circumstances, all agree in the principle upon which the statute is to be applied, that prisoners could only be found guilty under the act of Parliament of the immediate act which was involved in and formed part of the act or transaction which was charged as a felony in the indictment. This, indeed, was stated in terms by my brother Parke, in the case of *Reg. v. St. George*, in which he referred to the former case of *Reg. v. Gutteridge*, to the same effect, and to the opinion of my brother Patteson in *Reg. v. Crumpton*, and is the opinion of all the judges expressed in *Reg. v. Birch*, and *Reg. v. Phelps*. Assuming, then, that the principle upon which the question whether prisoners charged with felony, including an assault, can be acquitted of the felony and be convicted of the assault is settled by the cases to which I have referred, it only remains to apply that principle to the present case. The prisoners are charged upon this indictment with the murder of Mary Ann Parsons, by beating and striking at different times, as stated in the indictment. The act or transaction charged against them as a felony was the assaulting and beating, which caused the death of Mary Ann Parsons. The death was proved by the prosecutor to have been wholly caused by a blow given very shortly before or on the 4th of January, 1850, but as there was no evidence that that blow was inflicted by either of the prisoners, they were acquitted of the felony with which they were charged; but it was proved in the course of the trial, that, on several days and occasions before the day when the fatal blow was given, the prisoners had assaulted and beaten the deceased; but those assaults were quite distinct and independent of the act or transaction which caused the death, which was the felony charged. It is true that the felony is charged to have been committed by beating, and that the deceased did die by beating, and that the prisoners were proved to have beaten her; but the assaults and beat-

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ings proved against them did not form part of the act or transaction which was charged as a felony in the indictment, (which was the assault or beating which actually caused the death,) as appeared by the evidence in support of the charge of felony against the prisoners. The crown prosecuted in respect of the assaults and blows which caused the death, and they proved that, at the particular time, a blow was inflicted by some one which did cause the death of the deceased. It was that blow, and that blow only, which caused the death, and was in fact, as appeared by the evidence before the court, the act which was charged as felonious. The prisoners were not proved to have committed that act; nor were any of the assaults or beatings proved against them, nor were they a part of the transaction which the crown proved to be the cause of the death. They were therefore not involved in, nor did they form part of, the act or transaction which was charged as felony in the indictment. In the case of *Reg. v. Birch and others*, the prisoners were indicted for feloniously assaulting and robbing the prosecutor with violence. The evidence proved that the prosecutor was attacked by several persons, and knocked down, and that the prisoner was seen to strike him while upon the ground, with other persons about him, also misusing him; but, by reason of the absence of the prosecutor, the charge of felony was not supported, but the prisoner was convicted of assault under the statute, and they held rightly, because the assault formed part of, and was involved in, the act or transaction which was charged as a felony in the indictment. It was clear that it was then, at that time, that the felony charged in the indictment was committed, if committed at all, and the assault formed part of that transaction, and was involved in it. The distinction between that and the present case appears to me most clear. If in the present case it had appeared that at the time the mortal injury was received the prisoners were with the deceased, and had assaulted and beaten her immediately before the death, if that evidence raised a doubt whether the mortal injury was occasioned by the blows then inflicted by the prisoners, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of the felony, I should think that they might have been convicted of assault under the statute; for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as a felony in the indictment, and prosecuted as connected with it. Though the evidence failed to establish it as a felony, it was the only transaction which was intended to be charged as such. If that was not felonious, in that case there would be no other, for the assaults in question were wholly unconnected with the intent of the transaction, which was proved on the part of the prosecution to have caused the death of the deceased, and which was the felony charged against the prisoners, and of which they might have been found guilty if they could have been proved to have been acting in it. I may observe that the issue taken by the replication to the plea of *autrefois acquit* is, that the prisoners were not upon the former trial acquitted of the felony of murder, including the same identical assaults charged in the second indictment. For the reasons I have given, it appears to me

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that the felony of murder charged in the first indictment did not include the same identical assaults charged in the second indictment. The learned commissioner, in charging the jury, told them that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown. This, perhaps, is hardly correct in part, as the question is not whether the assault actually conduced to the death of the deceased, but whether it was part of the very act or transaction which was charged as felony in the indictment. But this is not a case for a new trial; and the question substantially is whether, notwithstanding the defect, if it be one, the verdict is, under all the circumstances, right. The charge of the learned commissioner, directing the jury to the main point, whether the assaults were distinct and independent assaults, clearly meaning distinct and independent of that which was involved in, and formed part of, the act or transaction charged as felony by the prosecution, seems to me to be perfectly correct to that extent, and it would be too much to set aside a verdict fully warranted by evidence, because, upon a critical examination of the judge's charge, there may have been a partial defect, the charge in substance being correct. Upon the whole, therefore, I am of opinion that the prisoners could not, consistently with the principle which I have already stated, have been convicted upon the first indictment of those assaults which were the subject of the second, and that the verdict which has been found for the crown is right.

COLERIDGE, J. I have considered this case with all the attention which the known conflict of opinions upon it among the judges made it proper for me to bestow, and although I cannot say that I have arrived at a conclusion free from all doubt, yet upon the whole I think that the conviction was right. The question depends on the true construction to be put upon the words of the statute, that at "the trial of any person for any felony whatsoever, whenever the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." These words are very general, and yet as justice requires, so I think from the very words, if closely examined, some limitations will be found clearly implied upon their generality, and these it will be right to point out. First, I remark the change of language from "felony" to "crime charged;" the first points to the species, the second to the individual case, and that case must be "charged," that is, expanded in statement on the indictment. The statute, therefore, applies only where the individual crime, being a felony in itself involving an assault, shall, as it is charged on the face of the indictment, include an assault on the person, and the whole charge will be compounded of the assault, and all those circumstances, whether of act, intent, or consequences, which go to make the felony complete; these, with the former, altogether make one whole. The statute then proceeds to say, that in such case the jury may "acquit of the

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felony," and find a verdict of "guilty of assault." Whether this means that they may first acquit of the whole charge as preferred, and then, looking at the facts composing it, select one and find the prisoner guilty of the assault as a new charge, or only that they may acquit of the felonious part of the charge and convict of the assault which formed the other part, is immaterial, for in either way the assault of which they find guilty must clearly have been that which was involved in, and made part of, the one entire crime charged on the face of the indictment. No one reading the section, and at all accustomed to the rules of legal interpretation, would suppose that any independent assault, though receivable in evidence it may be, as conducing to the proof of the prisoner's guilt, could be made the subject of the verdict; that would be to convict the prisoner of an offence with which he had never been charged, against which he had never, in fact, defended himself, and which he could not be supposed to be prepared to do. Thus far seems clear. But a further question is raised upon the words "acquit of the felony." An acquittal may take place where one prisoner only is charged, either because the proof fails to show that any felonious act has been committed, or because the act, appearing to be felonious, is not brought home to the prisoner, and where more than one prisoner is charged. Also, because he is not proved to have taken part in the act which, as to all or some of those charged with him, is found to be felonious. The statute does not, in terms, regard these distinctions, nor do I think it material to follow them out, because, if they at all affect the application of the statute — that is, if the statute does not apply to all cases of acquittal, but only to some, it will be found, I am convinced, if the inquiry be followed out, to depend on this — whether on the given ground of acquittal the assault could or could not be part of the whole crime charged as felonious. It seems to me, too, I own, that to make this directly the test of the applicability of the statute, leads to a more technical, or, if it be thought a fitter expression, a more strictly scientific rule of construction than is proper for the occasion; for I conceive it clear that the statute was framed to meet a commonly occurring evil of the entire escape from punishment of one who was clearly guilty of a part of the charge because he was not found guilty of the whole; and that, in framing their remedy for this, the framers were not careful to observe the precise conditions of the existing criminal law. Indeed, the remedy is founded on an avowed innovation upon it. Whether this might have been avoided, or had better have been avoided, is not the question. Our duty is to interpret the statute as we find it, and bearing this in mind in order the better to fulfil its intents. But recurring to that which I consider the true and the more expedient test, whether in any given case a party acquitted of felony may be found guilty of assault, the test, namely, whether the assault of which it is proposed to find him guilty formed part of the whole crime charged is felonious, the question still arises, How are you practically to ascertain that? And here I think it most convenient to introduce the case of *Reg. v. Edward Birch and Hardy*, because the resolution in that case brings us down to that point in

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the inquiry at which I have now arrived. "The judges there are reported," according to the manuscript note of my brother Parke, "to have thought that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment." The rule here laid down is the same to which a mere consideration of the statute, unaided by any decisions, would have brought me.

But then arises the question, how in any given case it is to be ascertained whether the assault on which the verdict is to be allowed to pass was "included in the charge and in the face of the indictment," and also "whether it be part of the very act or transaction which the crown prosecutes as a felony by the indictment." The generality of the language of our indictments makes it impossible to determine the first question merely by looking to the face of the instrument. We can learn no more from that than whether any assault is charged or not — what assault, when, where, and how committed — all particulars, in short, from which identification of charge and proof as to specific assaults could be made out, are left entirely unascertained by that; a state of things, at first sight, difficult to reconcile with the theory of pleadings, however little inconvenience it may be found to work in practice. Again: it would not be right to let the determination of the second question depend upon the opening speech of the counsel for the crown, nor on the course he may pursue in conducting his case: often there is no opening speech; often there are no counsel for the crown. But assuming there were both in all cases, it could not be left to the counsel merely by stating the assault in the opening, or offering evidence of it in the course of his proof, to make the prisoner liable to a verdict for it, unless the circumstances were such as really brought it within the scope of the statute. It seems to me, however, I own, that there is more seeming than real difficulty in a practical application of the rule as it is laid down in *Birch's Case*. In the first place, the indictment must be supposed to have alleged an assault or assaults, (it is immaterial which,) and one or more must be supposed to have been given in evidence. It must be supposed, too, that when the evidence is closed, the judge, by the light that it affords, will have been enabled to see what "act or transaction" it is which it has been intended to "prosecute as a felony by the indictment," (for that which he has, in fact, attempted to substantiate, the counsel must be taken to have intended to prosecute,) and, with that knowledge, how shall the judge have any difficulty in seeing whether there is any evidence to connect the assault or assaults proved with the felonious act or transaction which it has been sought to prove? It is the province of the judge on all trials to determine whether there is any evidence to prove an issue; and the connection I now speak of is in the nature of an issue. If

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there be evidence, the question for the jury will be, Do they believe it, and also the fact of the assault?—and if they believe both, the prisoner will be found guilty under the statute. Of course, what the nature and extent of the connection must be to satisfy the statute—what the evidence as regards time, place, intent, or other circumstance to make it out, the judge would have to point out to the jury. If there be in the judge's opinion no such evidence, this matter could never go the jury. Every case of this kind supposes an acquittal of the prisoner of the felony charged, but it has been thought that distinctions may arise according to the ground of acquittal.

Now, this may be either because the jury think no felonious act has been committed at all, as that, in case of murder, the deceased has died from natural causes; or, in robbery, that no money or chattel has been taken from the prosecutor, or because they think the felonious act is shown to have been committed by some third party, with whom the prisoner is not so connected as to be a felonious accomplice; or because simply they think the act, or the felonious intention, not satisfactorily brought home to the prisoner. But in all these cases, equally, the prisoner is disconnected with the felonious charges. The acquittal in all is simply that he is not guilty. A felony supposed to be committed by another, or not proved as to him, is as to him and as to the charge in hand as much as no felony—as if none had ever existed at all. And, therefore, in all these cases the supposed assault is equally disconnected with the felony; it can form no part of that which by the assumption does not exist at all. But it is obvious that this cannot prevent that sort of connection which the statute requires, because if it did, the statute, which applies only in cases of acquittal, could have no operation at all. The ground of acquittal may, indeed, often in individual cases show that the statute cannot be resorted to; but it will not, I conceive, ever make the application of the rule, according to the course I have sketched out, impracticable.

I have forbore in these remarks from citing cases, with the exception of that of *Reg. v. Birch*, on which I have dwelt, for the obvious reason that it was one decided by the assembled judges, in which it was attempted to lay down a rule for future guidance. I have considered myself bound by that case, and my only object has been to understand and apply it. Decisions of single judges, with all the sincere respect I feel for those who have pronounced them, I think are not entitled to much consideration, whereas in the present case we are trying the rule laid down by the body, and seeking to illustrate and apply it.

There is, I think, but one other case decided by the judges upon the section, and this so remarkably like the present, that I am unable to find any substantial difference between the two. I mean the case of *Reg. v. Phelps*. Like this, that was a charge of murder against more than one person, all charged as principals in one count, and the death alleged to have been occasioned by striking and beating. All were acquitted of the felony; there was evidence against two that they were present at, and took part in, the violence which occasioned the death; but Phelps, who had struck the deceased several blows, had

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gone away, from fifteen to thirty minutes before the violence was committed. The learned judge who tried the case seems, from the report in *Car. & M.*, rather to have assumed, that if this evidence against Phelps were believed, he might be found guilty of assault; and he was so convicted. But the judges were unanimously of opinion that the conviction was wrong. They assumed, in fact, that it was a distinct and separate assault; and they laid down in substance the same rule as that afterwards propounded in *Birch's Case*, viz., that to bring a case within the statute, "the assault must be such as forms one constituent part of the greater charge of felony." Neither report is full enough to enable one to say whether there was any evidence to connect Phelps's assault with the fatal and felonious violence of other persons, such as to make it part thereof without making him guilty of the felony; if there were, the result only would have been different, but the rule the same. Even if I thought this case wrongly decided, I should not feel that we were at liberty, divided as we are in opinion, to overrule it. Uniformity of decision, if it be important in any court or in any branch of the law, is, above all, important in this Central Court of Criminal Appeal, and in this branch of our law. But it is a great satisfaction to me, after much doubt and fluctuation of opinion, that I can concur with it entirely, and have the benefit of its authority. My judgment is already so much longer than I could have wished, that I will not prolong it either by applying what I have said at any length to the case before us, or by any consideration of the objection made to the direction of Mr. Gurney. In my view the latter cannot be necessary, for it resolves itself ultimately into the main point; and in any view the former may be dispensed with, after the judgments already pronounced, and where we are all so familiar with the facts and the questions we have had to consider. I will only say that the assaults given in evidence on the first trial, respecting which the present question has arisen, appear to me to have been so entirely and unquestionably severed from the felonious act or transaction of which the prisoners were acquitted, that my brother Talfourd was perfectly justified in not submitting them to the jury. I am, therefore, of opinion that the present conviction was right.

PATTESON, J. Two questions appear to me to arise in this case: first, whether the prisoner could have been convicted upon the former trial of all the assaults charged in the present indictment; and secondly, even supposing they could not, whether the proper points were put to the jury by the learned judge upon the present trial. The former indictment contained several counts, in some a single assault and murder was charged, in others a series of assaults on different days, causing together the death of the deceased and constituting the crime of murder. It is plain that one felony only is charged from the nature of the crime—murder of one individual; it is impossible that the counts could be treated as charging separate felonies, and the judge could not be called upon to put the prosecutor to his election. By the evidence, it appeared that the death arose exclusively from one

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assault and wound shortly before the death, and that all the other assaults were unconnected with the death. But the infliction of that assault and wound was not brought home to either of the prisoners, consequently they were entitled to be acquitted of the murder and of the assault which really caused the death. But several assaults were proved against them prior to that which caused the death, though unconnected with it; and whether they might have been convicted of those assaults, is the question. The stat. 1 Vict. c. 85, s. 11, provides, that "on the trial of any, for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." I do not think that this clause is to be confined to such crimes as necessarily include an assault, as rape, robbery, wounding with intent to murder, and such like. If it were so confined, murder and manslaughter would not be within it, for they may be committed without an assault, as by poisoning or negligence. I am satisfied that the clause extends to such crimes which in their nature may or may not include an assault, but which are charged in the indictment as so doing. The words of the clause are very general, and might at first sight be supposed to warrant a conviction for assault where the proof of the felony failed, whether that assault were connected with the supposed felony or not, and at whatever time, however distinct from the time of the supposed felony it took place. But the manifest injustice of so construing them has made it necessary to put some limitation upon their meaning. Accordingly, many cases have occurred in which learned judges have felt themselves bound to lay down what they considered to be the true limitation. Those cases were cited and commented upon when the present case was argued; and I do not propose to enter into a detailed examination of them. They are for the most part decisions of single judges on the circuit, entitled certainly to have full weight given to them, and assisting us greatly in coming to a right conclusion upon the present case, in which they are in some measure brought under review. They are, for the most part, cases in which the felony charged has included a single assault, and they lay down the rule that in such cases there can be no conviction for an independent assault at a different time, because such assault can by no reasonable construction be treated as the assault included in the felony charged.

There are, however, two cases reported which have been brought under the consideration of the whole body of judges, and from them I apprehend the rule may be, and ought to be taken; I allude to the cases of *Reg. v. Phelps and others*, 2 Moo. Cro. Ca. 240, and *Reg. v. Birch*, 1 Den. 185. In the case of *Reg. v. Phelps and others*, (reported also in 1 Carrington & Marshman, 180,) Phelps and two others were indicted for murder. It turned out in evidence, that Phelps, after having assaulted and knocked down the deceased, ran away; the deceased was afterwards assaulted and killed by some other persons supposed to be the other prisoners; the two assaults

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were not connected together. The learned judge left to the jury the question whether the other two prisoners were guilty of manslaughter, (it was a case where the offence was reduced to manslaughter under the circumstances,) and told them that they must acquit Phelps of the felony, but might find him guilty of assault. They found the other two prisoners not guilty, and Phelps guilty of assault. But upon reference to all the judges, it was held unanimously that Phelps could not, under the circumstances, be convicted of assault. In that case, as in the present, there was an assault which caused the death, but it was not proved against any of the prisoners; there was, as in the present case, an unconnected prior assault proved against one prisoner. But it was held by the judges not to be the assault included in the felony, charged by the indictment. Yet in that case, as in the present, the assault committed by Phelps was supposed by the framer of the indictment to be connected with the death, and was proved by the crown, and attempted to be connected with it; and it was shown by the evidence, which was believed by the jury, that it was disconnected with the death. The whole matter remained in doubt till the jury found their verdict, by which they acquitted all the prisoners of felony, not because they did not believe that a felony had been committed by some one, but because it was not proved against any one of the prisoners. If they had believed the assault committed by Phelps to have conducted to the death, they must have found him guilty of manslaughter. The indictment alone, therefore, does not afford the test as to whether any assault that is proved is included in the felony charged; but that question depends on the indictment, coupled with the evidence and the finding of the jury.

I confess I am unable to distinguish the case of *Reg. v. Phelps and others* from the present case. But it is said that the authority of that case has been shaken by the subsequent case of *Reg. v. Birch and others*, which is reported in 1 Den. 185, and mistakenly said to have been tried before me, whereas it was tried before Mr. Armstrong. So far from this case shaking the authority of the former one, in my judgment it entirely confirms it. That was a charge of robbery. The prosecutor did not appear, and there was no proof of the robbery; but a witness who saw the transaction proved an assault, and the jury not having any evidence of intent to rob, found the prisoner guilty of a common assault. There was but one transaction proved, and there could be no doubt that it was the same transaction which was to be proved, and for which the prisoner was indicted as a felony. Mr. Armstrong stated a case for the opinion of the judges, and they held the conviction for assault right. In the report are these words: "The judges thought, upon consulting all the authorities, that the enactment in the statute was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the

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indictment, and also be part of the very act or transaction, which the crown prosecutes as a felony by the indictment. This seems to me to be in exact accordance with *Reg. v. Phelps and others*. No difficulty can ever occur, as it appears to me, where the felony charged cannot from its nature, or does not in the manner in which it is charged, include more than one assault. One single transaction will be inquired into, and if the prisoner be proved to have been involved in that transaction, the quality of his act, whether felony or assault only, will be the main question. If the evidence satisfies the jury that the assault alleged was felonious, but fails in fixing the prisoner as the person committing it, he must be acquitted altogether, and cannot be found guilty of an independent assault committed at another time.

I cannot collect from the language used in the statute, nor can I conceive that the legislature intended, that where the evidence establishes the commission of a felony, including an assault by some body, the jury can never be at liberty to convict of an assault only. In such case, either the prisoner must be guilty of the whole charge, or, if he be not proved to be the guilty person, he must be acquitted of the whole. Any other assaults proved against the prisoner cannot be taken to be "part of the very act or transaction which the crown prosecutes as a felony," merely because in drawing the indictment they have been so charged wrongly and contrary to the real state of the facts. There being a felony proved by the evidence, if the assaults proved against the prisoner be connected with that felony, and conduce to it, the prisoner is guilty of felony; if they be not so connected, they are no part of "the very act or transaction which the crown prosecutes as a felony." If, indeed, the very act or transaction which the crown prosecutes as a felony turns out by the evidence not to be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony, and convicted of assault. And this may be the case even in murder or manslaughter; for it may happen that the prisoner has severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter under such a supposition. Yet it may turn out, in evidence that the deceased died from natural causes, not occasioned nor even aggravated, or in any way affected by the assault proved; and in such case the prisoner might, I think, be convicted of assault; and I doubt whether *Reg. v. Crumpton*, 1 Car. & M. 597, was rightly decided, there being in that case, in truth, only one assault proved. So that the view I take of the statute would not make it impossible even to convict of assault on an indictment for murder or manslaughter, though it would be very unlikely that such a case should occur.

I do not, however, mean to say, that even if such a consequence did necessarily follow, it would alter my view of the statute. I found my opinion upon what I believe to be the true meaning of the statute; and, upon the authority of the two cases to which I have particularly referred, I think that the question whether the jury can find

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a verdict of guilty of assault, depends not merely on the indictment, or on the course adopted by the prosecutor at the trial, or on what he may have attempted to prove, but on the indictment coupled with what was actually proved, and the conclusion which the jury came to on such proof. I find that in this case the death was shown to have arisen exclusively from one blow and assaults not proved to have been committed by the prisoners; that the assaults committed by the prisoners were prior to that blow, and, in fact, unconnected with the death, no part of "the very act or transaction" which caused the death; and therefore no part of the very act or transaction which the crown can fairly be said to have prosecuted as a felony; especially as the "act and transaction" which did really cause the death was an assault, and was laid in the indictment, but not brought home to the prisoners. If it had been brought home to them, they must have been convicted of felony: it is impossible that they could have been convicted of assault, only for that assault which was really included in the felony charged, and I cannot therefore see how they could have been convicted of the other assaults charged, which were not really included in the felony charged, merely because the framer of the indictment chose to insert them in it. If I am right in my view of this case so far, then I think that the learned judge's summing up was right. The second jury, not being bound by the finding of the first, might have found that the assaults proved on the second trial were connected with the death; and if so, a great difficulty might have arisen. The point, therefore, was important to the prisoners; it might have been in their favor if found differently from what it was; it could not prejudice them if found as it was. Again, even if it was wrong to put the point, it was immaterial, for it lay on the prisoners to prove their plea, and in my opinion they failed altogether in doing so. Upon the whole, I am clearly of opinion that the present conviction was right.

MAULE, J. I am of opinion with my Lord Chief Justice Jervis in this case, that the prisoners were entitled to an acquittal. The prisoners, who were indicted for an assault, having pleaded that the assault was comprehended in the indictment for murder, which was denied, the question which we are now called upon to determine arose. It seems to me upon the evidence, and, indeed, upon what is not at all disputed by any body, that the assaults charged upon the second indictment were assaults comprehended in the felonious violence charged upon the former occasion. Now the prisoners, upon the former occasion, were indicted for murdering Mary Ann Parsons by beating. There were a considerable number of counts stating various assaults, and stating, as the result of them, that the girl was murdered. Upon the second occasion no doubt was raised at all that the assaults for which it was intended to try the prisoners were the very same assaults that had been given in evidence upon the former occasion, and which were comprehended in some of the counts of the indictment upon that occasion. Now the crime charged is, I think, to be determined by looking at the indictment; the indictment is the

legal charge, and there the crime is charged in several counts comprehending assaults — comprehending different assaults — comprehending, according to concession, those very assaults for which the prisoners were secondly tried. Then, they were acquitted upon the first indictment; and they were entitled to be acquitted, no doubt, upon the evidence given before my learned brother Talfourd, upon the former trial; and no doubt could ever have entered into the mind of any body, who knew any thing about the matter, that they were entitled to be acquitted of the murder upon all those counts; and if they were, in fact, acquitted upon all those counts, they were acquitted of every thing which could have been proved under any one of those counts. Now I cannot understand why, assuming that, upon an indictment for homicide by violence, the parties charged may be convicted of an assault within the statute, putting aside the grave doubt which has been raised by two of my learned brothers, at least, whether upon an indictment for homicide, according to the true intent of the statute, you could upon any indictment for homicide convict of assaults; assuming that you could, (which I think we must do,) then it seems to me that upon every one of those counts in that indictment, (in whatever way they were dealt with by the counsel for the prosecution upon that occasion,) on every one of those assaults, the prisoners were entitled to the full benefit of the acquittal — that is, just to the same benefit of acquittal as the prisoners would have been entitled to if every one of those counts had stood alone. Now, I cannot at all understand, upon the assumption that I have already mentioned, why you can make a distinction between the different counts of that indictment. I do not know that any distinction is actually made. Suppose any one of them had stood alone — for the sake of simplifying the matter — suppose a count charged an assault on the 3d of November, which was proved to have ended in the felonious death of the deceased: if that had stood alone, and the evidence had been given which was given in respect of the death, and the jury had been of opinion that death had been produced by that assault, they might have convicted under that one count of murder or manslaughter. It is clear, therefore, that an assault is comprehended in that count; and they might also, upon the supposition which I have adverted to, have been convicted of an assault under that count; and if the jury might have convicted the prisoners of any of the assaults, they must be taken, I think, to have acquitted the prisoners of the whole.

There may be some inconvenience arising from whatever construction is put upon this act; and that the point itself is doubtful, I think is demonstrated by the fact that there are so many of the learned judges who entertain an opinion contrary to that which I entertain myself, otherwise I certainly should have thought that it was a clear thing enough. Upon the former occasion the indictment stated, in general terms indeed, but in terms which, it is not at all questioned, were intended to comprehend, and did comprehend, the particular transactions given in evidence on the part of the prosecution at the trial, the indictment charged those very things in several counts, and those very

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things in those counts were before the jury; and whether it was assault, or whether it was felony, I cannot see any ground for the reasoning that has been urged, that where there has been no charge of felony, you cannot convict of assault; that is contrary to every day's practice. It seems to me, therefore, that upon the former indictment it was quite competent for a conviction of assault to have taken place, and that, therefore, the parties were tried a second time for the same offence. The acquittal upon the former occasion seems to have taken place very much by the consent of all parties. The case seems to have failed as to the murder; and after that was decided, a conviction of the assault was not pressed; and, indeed, it is not very usual in cases of indictment for murder to press for a conviction of assault. It is very seldom, indeed, that I have known it pressed for, which is, perhaps, an argument in favor of the convenience of the interpretation which some of my learned brethren have suggested, and which would have been the true one, if we were not bound by contrary decision. I think that the prisoners had been, on the former trial, acquitted of that of which they have been convicted upon the second occasion, and, therefore, that the conviction is void.

ALDERSON, B. I am of opinion in this case that the prisoners are entitled to the judgment of this court in their favor. I had thought that this question had been concluded by the opinion of the judges delivered in *Reg. v. Birch*, till I heard the opinions of my learned brethren to the contrary. But as it is now clear that the law on this point is still unsettled, it will be proper to discuss the case on principle, and to try to construe the statute itself before we examine the cases, which, it must be allowed, are not altogether consistent. The words of the statute are these: "On the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person, if the evidence shall warrant such finding." It is clear, first, that the words "crime charged" mean crime charged as a felony; for the enactment only takes effect upon an acquittal; secondly, it is clear that the crime charged as a felony must be one which necessarily includes an assault. In other words, the assault to fall within the act must be an integral part of the felony charged. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must, of necessity, include an assault. The crimes of rape, and of cutting and wounding with intent, &c., are instances of this latter proposition; although there it is not unusual, and perhaps better, expressly to charge an assault in the indictment. But in murder and manslaughter it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning or by criminal omission are instances of this. We must, therefore, in all cases look to the charge in the indictment to determine the point. Now, in those cases where the indictment charges an assault, it does so for the most part in such general terms that it is impossible by

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merely looking at the indictment to identify the particular assault which is charged as an integral part of the felony. We must, therefore, often have recourse to the evidence given at the trial to identify the assault. As soon as we do this, we obtain in those cases an immediate criterion. Let me suppose a case of rape. In evidence, there is given an attack upon the female by beating her. If this be connected directly with the act of obtaining possession of her person, it is an integral part of the charge of rape. If it be wholly unconnected with that attempt, it is no part of the crime charged.

So again, in a charge of felonious cutting and wounding, no assault not producing a wound is any part of the crime charged as the felony. It might, indeed, be receivable in evidence in order to show a common purpose, and so to connect the person who assaulted with the felonious act of the other who wounded. But if it fails to do that, such an assault is not within the provisions of the statute. For the very statement of the assault as proved disconnects it with the crime charged. But suppose in these cases that there are assaults connected with the actual charge, and which actually go to the jury as a part of it, but the jury are not satisfied that the rest of the charge is made out, then the statute does apply, and the verdict of assault may follow upon such proof given, and the party may be punished for the assault mentioned in the indictment, identified by the evidence, and left to the jury as part of the felony.

Thus, in *Reg. v. Brownlow*, 9 Car. & P. 366, a charge of rape: there a boy was shown to have attacked a girl for the purpose of obtaining possession of her person, but being under fourteen, he could not be by law, as it is said, guilty of rape. He was found guilty of assault. And yet there he was incapable of committing the felony at all. But the assault was an integral part of the rape, which was erroneously charged against him. So again in murder. The indictment charges a murder by an assault, by which a mortal injury was given. An assault is proved. But it is doubtful whether it caused death, or whether the deceased died by some preëxisting cause alone. Surely, this assault is part of the charge of murder. It must be left to the jury, in order to determine the guilt. Nothing separates it from the murder but the verdict. If opposing evidence as to the fact of its causing or not causing the death be given, this assault, as part of the murder, puts the accused in immediate jeopardy of life. And is it possible to make a legal principle out of the more or less clearness of the evidence as to the assault having caused the death? But if this be true of one assault,—and I really do not see how the case I put can be doubtful, I am sure I have known it the constant practice ever since the statute,—how are we to distinguish one assault from several assaults? If the death be charged as being caused by these assaults combined, it is surely the same as if caused by one alone. The several assaults then become as much integral parts of the charge as the one assault was before. And for this I have to cite, in addition to the reason of the thing, the very high authority of my brother Patteson, in *Reg. v. Thomas Cruse, and Mary his Wife*, who were charged with causing a bodily injury, dangerous to life, to a poor girl,

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of tender age, in their service; first, by striking and beating her with their hands and fists; secondly, by kicking her in the back; thirdly, by seizing her and lifting her up and striking her head against a wooden beam; and, fourthly, by casting and throwing her on a brick floor. In that case there were four distinct assaults. The intent to murder, however, not being made out to the jury's satisfaction, the crime charged was not a felony. But the prisoners were found guilty of assault, for the assaults were all parts of the crime charged; and this ruling of my learned brother was supported by the opinion of all the judges on the case being reserved.

How does this case differ in principle from the one now before us? Here, several assaults between two particular days named in the indictment were charged as together causing death; there, several assaults were charged as producing a bodily injury dangerous to life. Here, the assaults causing death were charged as having been committed of malice aforethought; there, they were charged as producing a dangerous bodily injury, with intent to murder. If the assaults in *Reg. v. Cruse and Wife* were part of the crime charged, the assaults in *Reg. v. Bird and Wife*, which fell within the days limited by the indictment, were part of the crime charged also. Bird and wife, therefore, were in jeopardy, under the indictment for murder, of being punished for these assaults, though not for any other assaults not included within the limits of the days fixed by the indictment. If so, the acquittal being general, *cadet quæstio*, they may plead that acquittal in bar of a second indictment. But I understand that some of my learned brethren conceive that the two cases are distinguishable, on the ground that, in the case of *Reg. v. Bird and Wife*, there was given in evidence a particular blow which did cause death, and that so there was a separate felony proved, though not one committed by the prisoners. But this is, I conceive, a palpable fallacy. If the special circumstances of that blow are unknown, and that they are so is quite clear, who can properly say that such blow was felonious? To say so is in the nature of a *petitio principii*. Such a blow, by an unknown hand, is, in law, undistinguishable from a disease causing death, or any other circumstances, for which the prisoners are not responsible; and if the blow is attributed to a third person, that third person has no means of coming before the jury to explain the circumstances of the blow. This therefore is, I apprehend, a distinction without a difference. I conceive, then, that the statute applies in all cases where the crime charged consists necessarily of an assault and something more, which "something more" converts the assault from a misdemeanor into a felony.

Thus, if we analyze a charge of cutting and wounding, it is, first, a wounding, which necessarily includes an assault; secondly, it is with one of the intents mentioned in the statute. Now the first, if proved alone, still leaves the case a misdemeanor. It is the finding of the second which alone makes it a felony. The jury, in acquitting of the felony, may therefore find the first, if proved, which is an assault. The crime of manslaughter by violence, in like manner, if divided, is, first, an assault; secondly, an assault which causes death. Of these

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two the felony is composed. If the second be not found, the first is an assault; if the second be found, it must, in all cases, be felony. If, therefore, no one can be found guilty of assault, unless it be an assault which caused, or contributed to cause, death, the statute can never apply to any case of murder or manslaughter at all. But, surely, it would be strange and wrong so to construe the statute. For the statute says, "any felony whatever, in which the crime charged includes an assault." It would be a strange construction of it, unless we are to decide upon some supposed spirit or intention of the legislature, casting aside the letter altogether, to say, that manslaughter by violence, a crime which clearly is a felony, and which as clearly includes an assault, is not within these express words. But this was, in substance, the criterion put by the learned commissioner to the jury when he summed up the facts on this plea. On this narrow ground, alone, of the misdirection, I conceive this conviction is clearly wrong, because the proper question was not put to the jury.

But I wish, also, to express my opinion on the more general question. I proceed, therefore, to advert to some of the cases, and first to consider *Reg. v. Watkins*, which seems to me to have been decided on right principles, although I entertain a doubt whether a clause in the 1 Vict. c. 86, s. 2, not adverted to, apparently, might not make it proper to reconsider the particular case, if it should even occur again. There the prisoner was charged with breaking and entering a dwelling-house with intent to commit a rape, and also with assaulting J. S., being in the dwelling-house. The judges, when the case was reserved, thought that the whole felony consisted in the burglary, and that the assault was merely an aggravation; and so they held the assault no part of the crime charged as felony, and the conviction of assault wrong. I agree entirely with the principle, though I doubt whether, after the statute 1 Vict. c. 86, s. 2, which expressly made the whole charge, including the assault, a capital felony, the verdict ought not to have been sustained. To the above cases may be added the case of *Reg. v. Gutteridge*, and the case of *Reg. v. St. George*, where the law was, I think, clearly laid down by my brother Parke, on the high authority, undoubtedly, of *Reg. v. M'Phane and others*, which seems to me to be the true principle. These three persons were charged with feloniously cutting and wounding: as to two of them, a joint act of wounding was proved; but at this act the third prisoner was not present, nor did he concur in it; but he afterwards committed another assault on the prosecutor, and he was, on the direction of the lord chief justice, acquitted altogether. But this was because the assault was no part of the felony charged; it was the wounding which was put to the jury. In this respect it resembles the case of *Reg. v. Phelps*, and it ought to be construed, if in the offence committed it could be shown the prisoner was a party to the offence, he would be liable to have been found guilty of the felony. Now there are other cases, to which it is necessary now to refer, in which a different opinion has been entertained. Reliance is placed on the case of *Reg. v. Phelps*, which is not so easy to be reconciled with the above view of the law. But on looking at that indictment,

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which is to be found in Carrington & Marshman, 180, I find that the murder there was charged by striking and beating the deceased. The point made there was, however, that the assault by Phelps was altogether disconnected with the felony. And the judges decided that of this he was improperly convicted; and I apprehend that their decision may be explained thus: When the evidence closed, there were two separate and distinct charges before the court; one of assault by Phelps alone, and the other of a joint felony at another time by Southan and the third prisoner; these were wholly separate, the one from the other, at that time. The judge, I conceive, ought not to have put both to the jury; and if, as was his duty, he put one only, it was clear that he ought to put the felony to them. Phelps, therefore, ought to have been acquitted altogether. It is not like the case of one wounding, which may be a felony in one, and a misdemeanor in another, according to the proof or failure of proof of the intent with which the act was done. There, only one act goes to the jury for their decision. On this ground, I conceive that *Reg. v. Phelps* may well stand as an authority without affecting this case. I cannot, however, agree with the decision on which, in this case, my brother Talford very naturally acted at the first trial. I allude to *Reg. v. Crumpton*, decided by my brother Patteson. That was murder by a course of ill usage, including a beating expressly charged in the indictment. That beating was proved, though it did not contribute to cause the death. But surely it was part of those acts which were altogether charged as causing death, and so producing the murder. It is not to be presumed, as my learned brother Patteson is reported to have said, that this would lead to a fraudulent insertion in the indictment of an assault wholly disconnected with the charge. We cannot act on such a presumption. Indeed, it may perhaps be a little doubtful whether an assault charged as having with other acts not *ejusdem generis*, caused together the death, would not be so integral a part of the charge as if not proved to entitle a prisoner to an acquittal, on the ground of a variance as to the mode of death charged in the indictment. These two cases form the main difficulty, no doubt, in determining the present question. They were both prior to the case of *Reg. v. Birch*, and I think that that case, properly read and understood, decides the present question. I do not, however, mean to discuss that case now. It has been already sufficiently adverted to by my learned brethren. Upon principle, therefore, and the true construction of the statute, added to, as I think, a great preponderance of authority as to that construction, I have arrived at the conclusion, that in this case the defendants are entitled to a judgment in their favor.

PARKE, B. The question submitted to us by the learned commissioner of Oyer and Terminer and Jail Delivery in this case is, whether he was right in the direction he gave to the jury. The mode in which he states the question to have been left was this: After telling the jury that the burden of proof lay upon the prisoners, he directed that if they were satisfied that there were several distinct or

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independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown. I am of opinion that this was not the true mode of leaving to the jury the only question in issue, namely, whether the prisoner was acquitted of the felony and murder, including the same identical assaults charged in the present indictment. The proper question is, whether the prisoner could have been lawfully convicted on the former indictment of all the assaults charged in this, and whether they were charged by that indictment with those assaults; the first branch of that question being matter of law for the judge, and the second a question of fact for the jury.

In order to support the plea of *autrefois acquit* in all cases, both these circumstances must occur. It is not enough that the prisoner could have been lawfully convicted on the first indictment for the offence charged in the second, for if so, as the language of an indictment describing any offence is in general not material as to the date or place, or many other circumstances, if in the same county, the indictment would be equally descriptive of many offences of a similar character, and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort in the same county against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved, that the offence charged in the former indictment was the same identical offence with that charged in the indictment pleaded to. This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony; larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment would have to satisfy the court, first, that the former indictment on which an acquittal took place was sufficient in point of law, so that he was in jeopardy upon it; and, secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy; if more or less evidence is gone into on the first trial the difficulty is little; if none is offered, and the acquittal takes place, it is still an acquittal entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in showing what the offence charged was; but it may be proved by the testimony of witnesses who were *subpoenaed* to go, and did go, before the grand jury by the proof of what they then swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, any evidence which would show what crime was the subject of the inquiry and identify the charge, and limit and confine the generality of the indictment to a particular case. If the indictment were in a more precise form, and could be made to identify the offence charged on the face of the indictment itself and distinguish it from all others, (as Scotch indictments I believe do,) no such evidence would be required; but where the form is general, and may apply to a great variety of

charges, parol evidence is necessarily admitted to show what the charge was, and if that evidence identifies the charge, and shows what it was, its office is ended for this purpose; and whether the evidence given on the former trial was true or false, whether the jury believed or disbelieved it, and what inference they drew from it, is immaterial, provided the prisoner was acquitted. The sole use of such evidence on a plea of *autrefois acquit* is to show what the charge in the indictment really was, and that being done, the effect of the indictment in the general form is just the same as if the offence were particularly described in it in minute terms to the exclusion of all others, and then the maxim *nemo debet bis vexari pro eadem causa* applies.

No doubt the generality of the terms of the indictment leads to some inconvenience and difficulty; but it is compensated by the great advantage to the administration of justice from the greater latitude allowed to evidence on the trial which rarely, indeed never, operates to the prejudice of the prisoner, who generally knows the precise charges on his commitment. Thus far is very clear, and there is little difficulty in applying this rule to all indictments at common law. If the former indictment had been, as the present is, for a certain number of assaults, and they were identical, an acquittal on that indictment would be a good bar to this. The only question would be, whether the assaults were identified by adequate evidence. But all the difficulty in this case arises from the provision in the stat. 1 Vict. c. 85, s. 11, "that, on an indictment for a felony, the prisoner may be convicted of an assault," which is a departure from the clear and intelligible rules of the common law, and has produced no inconsiderable inconvenience, and amongst the rest the nice and difficult questions which have occurred upon the statute. I think that a proper construction has been put upon it by the eleven judges who decided the case of *Reg. v. Birch and another*, who were the same judges who decided the following case in Mr. Denison's Reports, p. 187. The judges, proceeding to construe this statute and ascertain what the species of assault contemplated by the 11th section was, found two classes of cases already decided. If they had held that wherever the felony charged on the face of the indictment in its nature included an assault, as rape, homicide by violence, or felonious cutting, the prisoner might be convicted of a common assault, wholly unconnected with any felony, the case in 2 Moo. Cro. C. 123, would have been wrongly decided.

They held, therefore, that the indictment was not to be considered as an indictment for the offence of an assault and also of a felony. On the other hand, if the statute was to be considered as applying only to cases where the assault was committed, with intent to commit the felony charged in the indictment, to inchoate felonies proved to be such, then in all the cases in which parties had been convicted of assaults, where the charge was of felonious cutting with intent to commit murder, or grievous bodily harm, it would have been wrong, for the acquittal went on the ground that the prisoner did not intend to do either. They therefore held, that the enactment was not to be

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confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment; and also be part of "the very act or transaction which the crown prosecutes as a felony by the indictment." This construction having met with the concurrence of all the judges, it ought to be abided by; in my judgment it puts a correct interpretation on the words of the statute. The case of *Reg. v. Phelps*, which has been cited and much commented upon, may, perhaps, be distinguished from this case on the ground already stated by my brothers Martin and Alderson. That was a charge of murder by a joint assault or assaults charged upon three persons, and evidence was given to prove it, and one could not be in jeopardy, or convicted of a single assault at a different time, and totally unconnected with the transaction which the crown prosecuted as a murder.

But, whether distinguishable or not, it seems to me to be immaterial. If not distinguishable, I consider that *Reg. v. Birch*, which was decided afterwards upon full consideration of all the cases, and, in order to settle the rule on the subject, must prevail. But then, a difference of opinion amongst the judges arises on the construction of this, which clearly ought to be the rule. As to that part of the rule which relates to the crime charged on the face of the indictment, including an assault against the person, there is no difficulty; it applies to felonious cutting, rape, felonious homicide by violence; all of which, in their nature, include a charge of assault against the prisoner, and the charge of murder in this case includes an assault: but it must also be part of the very act or transaction which the crown prosecutes as a murder by the former indictment. And here lies the whole difference. The learned counsel thought that to fall within the rule it must really have been, and not merely charged to have been, contributory to the death of the deceased, which the crown charged as a murder; and many of my brethren are of the same opinion: whereas, it seems to me that it is enough to bring the assault within the meaning of this clause, if it is charged by the crown to be part of the very act or transaction which it charges as a felony, and it is made the subject of inquiry as such. There must be a *charge* of an assault, as parcel of a felony, not necessarily an assault *actually* being a parcel of a felony, just as in the case of a charge of a rape, an assault which the crown charges as having been committed for the purpose of effecting it, though no rape has been committed, or a wounding charged to have been made with intent to kill and murder where no such intent has been proved, may be punished on an indictment for either felony, though in one the assault could not contribute to the rape, or in the other to the felonious wounding; for there was neither one nor the other. These assaults form part of the charge of felony made by the crown in all these cases; they are put in a course of trial as such, though they did not in truth contribute towards any felony, for no felony was

committed. Therefore, in all these cases where the charge on the face of the indictment includes an assault, that assault which the crown means to charge by the express allegation of an assault (for we have only to deal with an express allegation in this case) as part of the very act which it charges as a felony, is virtually charged, and as soon as the assault which the crown means so to charge is identified, marked and distinguished from all others by competent evidence, the case becomes exactly the same as if the indictment were expanded and the assault completely described, so as clearly to identify it. The prisoner is charged with it, and may be convicted of it on that indictment if he is acquitted of the felony: or it is only a conditional charge dependent on that fact, and if he be acquitted, he is acquitted altogether, and forever, from the charge, and every part of it, just as if he had been indicted and acquitted of the same assault alone, fully identified by time, place, and every other necessary circumstance to distinguish it from every other assault. The evidence to identify this assault may be any evidence of the same sort as I have above stated is admissible to prove the identity of any other charge, not evidence to prove the crime or any part of it actually committed, but to prove what the offence was which the crown did charge. Feeling quite satisfied that this reasoning is correct, it remains to apply it to the facts of the present case. A question immediately occurs, whether the 11th section applies to indictments of felonies, including a single assault only, or to felonies which include many assaults. A rape or murder may include more assaults than one, and I do not feel a doubt but that in such cases, where the evidence shows that many assaults are meant to be charged as connected with the imputed murder, or rape, or felony, the prisoner may be convicted of them, or any of them. Now it appears that in this case, on the former trial, the crown charged the defendants with certain assaults between certain days, which assaults it charged to be the causes of the death of the deceased, and gave evidence of them, and tried to prove that they were so. The charge in the former trial consisted, therefore, of these three propositions: that certain assaults were committed by the prisoners, that they were committed *malo animo*, and that they caused the death of the deceased. On the first charge they were put on their trial as well as the last, absolutely, not conditionally, *videlicet*, provided the assaults turned out to have conduced to the death; and if the assaults are identified to be the same as those charged in this indictment, the prisoners were charged with and acquitted of the assaults now charged. Indeed, if the charge of assault was to be tried only in the event of the assaults appearing to the jury to have contributed to the death, I do not see how they could have been tried at all as assaults, and the prisoners convicted of them; for if they did contribute to the death, the very assault which is punishable as such being a wrongful act, the offence was manslaughter at least. It is quite clear that the legislature contemplated such an assault as may be involved in the charge of felony, and of which the prisoner could be convicted, though acquitted of the felony; and how that could be, in a charge of felonious homicide, if the assault actually

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conducted to the death, I cannot understand. This direction of the learned commissioner seems to me, therefore, in any view of the case, to be manifestly wrong, if the act applies to murder or manslaughter at all. A doubt has been suggested whether it does, by my brother Erle; but the words of the statute are perfectly clear, according to the ordinary rule of construction, and as they lead to no absurdity or incongruity in any view of the case, I think clearly they must be taken to include, as they expressly state, every felony. If the act does not include murder and manslaughter, the direction would be wrong: but the defendants would have been lawfully convicted of the assault in the present indictment, on the ground that charges of murder and manslaughter were to be dealt with at common law, and not under the statute. In this case, the jury acquitted of the felony, for the blows that were proved, it appeared, did not cause the death of the deceased; but the charge of assault, in my opinion, remained, and the prisoners might have been convicted of those very assaults which are charged on the second indictment; and, having been acquitted of the charge in that indictment, they are acquitted of the charge in this indictment. And it would be contrary to the wise principle of our law, that a man should be subject to more than one trial for exactly the same offence.

POLLOCK, C. B. The question in this case turns upon the true construction of the statute 1 Vict. c. 85, s. 11, by which, for the first time, it became lawful, upon an indictment for felony, to convict of a misdemeanor; and we have to consider whether the prisoners could have been properly found guilty of an assault when on the former occasion they were tried and acquitted of the murder, for if they could have been so found guilty, they have once been in peril, and they are now entitled to our judgment on the plea of *autrefois acquit*. Under the circumstances presented for our consideration by the learned commissioner of Oyer and Terminer, I am not surprised that there should be considerable difference of opinion in the assembled judges. We are called upon to put a construction upon an act which, in very general terms, has introduced an anomaly in the administration of the criminal law. The distinction between felony and misdemeanor is as old as the law itself, and many important consequences follow from that distinction. Before the passing of the Prisoners' Counsel Bill they were more important than they are now, but some important differences still remain. The statute has not abolished the distinction between felony and misdemeanor, whether it would have rendered the case more clear or not, or whether it, when it came to be fully considered, would not have raised a greater difficulty than we have now to contend with, I shall not pause to inquire; but the statute has introduced, in not better or clearer terms, very general power to acquit of felony and to convict of assault only where the crime charged shall include an assault, and the evidence will warrant such finding. The statute makes no specific provision for the present or any other particular case as distinguished from the general class. It does not provide specially and separately for various very different cases that may

be suggested, as, for instance, where some felony has actually been committed by some one, but possibly not by the prisoner; or where it is left in doubt whether it was by the prisoner or not; or where it is clear that no felony has been committed, but an attempt has been made to commit one by the prisoner, or by a person not before the court; nor does it apparently make any distinction between the above cases and a case where the whole charge of felony is founded in mistake, and there has really been no felony committed at all, or even attempted, and the charge of felony is altogether an error. I think it cannot be matter of surprise, when all these various cases may arise, and the statute consists, as to this part, of a few general words only applicable to all, that much doubt may arise as to their meaning when it is necessary to apply the same words to cases differing so much the one from the other. Here we have to inquire, in the construction of this part of the act, what was in this case the crime charged, and did it include the assaults in question? If it did, the prisoners have already been acquitted, and cannot be tried again. If it did not, the former acquittal is of no avail, and the present conviction is right. I think the meaning of the words "crime charged" must be sought for in the old forms under which the jury were addressed by the officer of the court — "your charge, therefore, is to inquire whether the prisoners be guilty of the felony," and, according to the new practice introduced by this act, the charge to the jury will be to inquire whether the prisoners were guilty of the felony and assault, or not guilty; and the question mainly turns on what would be the assault thus alluded to? It appears to me that in case where a felony (of whatever sort) has been actually committed, the charge is the felony committed, and the means whereby it was committed; and I entirely agree with the doctrine laid down by my brother Parke, in the case of *Reg. v. St. George*, 9 Car. & P. 491, that the prisoner can only be found guilty under the statute of an assault involved in and connected with the principal charge of felony. This cannot, I think, depend upon the mistake or blunder of the prosecutor, or of his counsel, or of any of the witnesses; it depends upon the fact itself, as it may come out in evidence and be found by the jury. It seems to me contrary to first principles, in administering the criminal law and in construing this act of Parliament, that an accused party who may have been guilty of a common assault, and a common assault only, never intending to commit a felony, or even contemplating it, should be liable to three years' imprisonment, and, according to some constructions of the act, to hard labor during that time, because some blundering clerk of assize has drawn an indictment, or some rash prosecutor has made an accusation, or some mistaken or incredible witness has associated by the indictment, by the accusation, or by the evidence, this simple assault with a felony, be it murder or otherwise, with which felony in truth and in fact it can have no connection whatever. In this case the charge was the murder of Mary Ann Parsons. It appears that she came to her death by a single blow which could not, by the evidence, be imputed to either of the defendants. The guilt of both might be suspected with reference even to that fatal blow, but the guilt of

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neither was proved, and therefore very properly both were acquitted. That very acquittal on that ground, in my judgment, disassociated all other assaults that did not tend to the death from the crime charged, and the crime charged did not include those assaults, and I think it was not lawful for the jury to convict of those assaults. It would follow from this that they were properly convicted of assault in the case now before us. I must admit the construction of the act as to this matter is by no means free from considerable doubt; the difference of opinion of the assembled judges sufficiently attests this. Many cases of difficulty may be presented either on one side or the other, and I must freely confess that I doubt whether any construction of the statute would afford a more satisfactory solution of all the difficulties that may arise in the various cases that might be suggested. During the course of the two arguments and the deliberations that have ensued, I have found it difficult to come to a conclusion which I felt to be perfectly satisfactory, but comparing the difficulties on the one side and on the other, I have at length felt it my duty to pronounce the judgment already expressed; and while I disclaim any argument or any consideration or any view of any sort founded on this particular case itself, I own I have been fortified by this consideration, that this statute is manifestly a departure from the common law; as far as its enactments are clear we are bound to obey and to enforce them, but when they become doubtful, (and who shall say that this is not so?) it is safer, in my opinion, and, it is our duty, to stand by the common law.

JERVIS, C. J. I am of opinion that the conviction in this case was wrong. The question turns upon the true construction of the stat. 1 Vict. c. 85, s. 11, which in *Birch's Case* (reported in Den. C. C. 185) was considered by eleven judges, who consulted all the authorities, and professed to expound the act with a precision which could not mislead. That case was principally relied upon in argument by the defendants' counsel, and ought to be a ruling authority upon the subject; but, unfortunately, some question the correctness of the rule which is there laid down, whilst others, adopting it, arrive at a conclusion altogether different from that which was intended by the framer of the rule. We cannot, therefore, take that case as conclusive upon the present occasion; and inasmuch as a reference to all the authorities has produced this most unsatisfactory result, we must, unaided by authority, endeavor to put a construction upon the statute itself. I take it for granted, that in all cases where the act applies, and the evidence warrants such finding, the jury must find the prisoner guilty of assault. It is not left to their option to convict of assault or to acquit the prisoner altogether, and leave him for further prosecution in the form best suited to the justice of the case; the act is compulsory, and the prisoner is in jeopardy in all cases to which the act applies. Numerous inconveniences might be pointed out, as the certain result of this admitted construction. The statute only applies to indictments for felony where the crime charged includes an assault. It is absolutely necessary that the crime charged should legally include an assault. Crimes of this nature are, murder by violence, rape, robbery,

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stabbing, and the like. You cannot bring the case within the act by averring in the indictment an assault as accompanying a crime which legally does not include an assault; nor, on the other hand, is it necessary, in order to found the jurisdiction of the jury to state an assault in an indictment for a crime which legally includes an assault. It is prudent to do so, but it is not in strictness necessary; for where the crime charged includes an assault by implication, the charge of assault appears upon the indictment, and thus the rule is satisfied, which requires that, when the record is made up, the charge should appear upon which the prisoner is found guilty, and subsequently punished.

But although the crime charged does legally include an assault, it does not follow that the act may be called into operation. The jury have but a conditional power to find the prisoner guilty of the assault, they must first acquit him of the felony. The trial, therefore, throughout, is a trial for felony, to be governed by the rules which regulate such trials; and if one assault only be laid in the indictment, as the cause of death by violence, or if the crime charged in its nature, legally or in fact, include but one assault, one assault only can be produced in evidence, as tending to prove the crime charged; and the prosecutor having made his election and proved one assault, cannot abandon that and produce evidence of another assault, having no relevancy to the proof of the crime charged, but committed upon another occasion. So if several assaults are laid in the indictment as causing the death, or if the crime charged legally may, and in fact does, include several assaults, the same rule will prevail, subject to the same qualifications, for the trial is proceeding for felony, the evidence produced is produced to prove the felony, and is to be controlled by the rules which are applicable to trials for felony. When the whole evidence is closed, and before they can find him guilty of assault, the jury must acquit the prisoner of the felony. Upon what ground is that acquittal to take place? Surely because the evidence warrants such acquittal. The prisoner could not be guilty of the felony, if there was no felony, or if the felony was committed by another person. But the evidence which was brought forward to prove the felony, and which was insufficient for that purpose, may prove beyond doubt that the prisoner was guilty of assault. The crime charged includes an assault. The jury have acquitted the prisoner of the felony; the evidence warrants a finding of assault. What are the jury to do? The act is admitted to be compulsory. They shall "find a verdict of guilty of assault against the person indicted." Thus reading the statute, full effect is given to the plain, common-sense meaning of every word used. I have not sought for the object of the enactment, for where there is no ambiguity, no foreign aid is necessary to expound an act; and it is dangerous to speculate upon the motives of those who may pass measures through Parliament, particularly if the plain meaning of words is to be disregarded, for the purpose of effectuating that supposed intention. It is contended that the assault, of which alone the jury can convict the prisoner, is that included in the crime charged, and that, consequently, if the crime charged be committed by another, the

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two the felony is composed. If the second be not found, the first is an assault; if the second be found, it must, in all cases, be felony. If, therefore, no one can be found guilty of assault, unless it be an assault which caused, or contributed to cause, death, the statute can never apply to any case of murder or manslaughter at all. But, surely, it would be strange and wrong so to construe the statute. For the statute says, "any felony whatever, in which the crime charged includes an assault." It would be a strange construction of it, unless we are to decide upon some supposed spirit or intention of the legislature, casting aside the letter altogether, to say, that manslaughter by violence, a crime which clearly is a felony, and which as clearly includes an assault, is not within these express words. But this was, in substance, the criterion put by the learned commissioner to the jury when he summed up the facts on this plea. On this narrow ground, alone, of the misdirection, I conceive this conviction is clearly wrong, because the proper question was not put to the jury.

But I wish, also, to express my opinion on the more general question. I proceed, therefore, to advert to some of the cases, and first to consider *Reg. v. Watkins*, which seems to me to have been decided on right principles, although I entertain a doubt whether a clause in the 1 Vict. c. 86, s. 2, not adverted to, apparently, might not make it proper to reconsider the particular case; if it should even occur again. There the prisoner was charged with breaking and entering a dwelling-house with intent to commit a rape, and also with assaulting J. S., being in the dwelling-house. The judges, when the case was reserved, thought that the whole felony consisted in the burglary, and that the assault was merely an aggravation; and so they held the assault no part of the crime charged as felony, and the conviction of assault wrong. I agree entirely with the principle, though I doubt whether, after the statute 1 Vict. c. 86, s. 2, which expressly made the whole charge, including the assault, a capital felony, the verdict ought not to have been sustained. To the above cases may be added the case of *Reg. v. Gutteridge*, and the case of *Reg. v. St. George*, where the law was, I think, clearly laid down by my brother Parke, on the high authority, undoubtedly, of *Reg. v. M'Phane and others*, which seems to me to be the true principle. These three persons were charged with feloniously cutting and wounding: as to two of them, a joint act of wounding was proved; but at this act the third prisoner was not present, nor did he concur in it; but he afterwards committed another assault on the prosecutor, and he was, on the direction of the lord chief justice, acquitted altogether. But this was because the assault was no part of the felony charged; it was the wounding which was put to the jury. In this respect it resembles the case of *Reg. v. Phelps*, and it ought to be construed, if in the offence committed it could be shown the prisoner was a party to the offence, he would be liable to have been found guilty of the felony. Now there are other cases, to which it is necessary now to refer, in which a different opinion has been entertained. Reliance is placed on the case of *Reg. v. Phelps*, which is not so easy to be reconciled with the above view of the law. But on looking at that indictment,

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which is to be found in Carrington & Marshman, 180, I find that the murder there was charged by striking and beating the deceased. The point made there was, however, that the assault by Phelps was altogether disconnected with the felony. And the judges decided that of this he was improperly convicted; and I apprehend that their decision may be explained thus: When the evidence closed, there were two separate and distinct charges before the court; one of assault by Phelps alone, and the other of a joint felony at another time by Southan and the third prisoner; these were wholly separate, the one from the other, at that time. The judge, I conceive, ought not to have put both to the jury; and if, as was his duty, he put one only, it was clear that he ought to put the felony to them. Phelps, therefore, ought to have been acquitted altogether. It is not like the case of one wounding, which may be a felony in one, and a misdemeanor in another, according to the proof or failure of proof of the intent with which the act was done. There, only one act goes to the jury for their decision. On this ground, I conceive that *Reg. v. Phelps* may well stand as an authority without affecting this case. I cannot, however, agree with the decision on which, in this case, my brother Talfourd very naturally acted at the first trial. I allude to *Reg. v. Crumpton*, decided by my brother Patteson. That was murder by a course of ill usage, including a beating expressly charged in the indictment. That beating was proved, though it did not contribute to cause the death. But surely it was part of those acts which were altogether charged as causing death, and so producing the murder. It is not to be presumed, as my learned brother Patteson is reported to have said, that this would lead to a fraudulent insertion in the indictment of an assault wholly disconnected with the charge. We cannot act on such a presumption. Indeed, it may perhaps be a little doubtful whether an assault charged as having with other acts not *ejusdem generis*, caused together the death, would not be so integral a part of the charge as if not proved to entitle a prisoner to an acquittal, on the ground of a variance as to the mode of death charged in the indictment. These two cases form the main difficulty, no doubt, in determining the present question. They were both prior to the case of *Reg. v. Birch*, and I think that that case, properly read and understood, decides the present question. I do not, however, mean to discuss that case now. It has been already sufficiently adverted to by my learned brethren. Upon principle, therefore, and the true construction of the statute, added to, as I think, a great preponderance of authority as to that construction, I have arrived at the conclusion, that in this case the defendants are entitled to a judgment in their favor.

PARKE, B. The question submitted to us by the learned commissioner of Oyer and Terminer and Jail Delivery in this case is, whether he was right in the direction he gave to the jury. The mode in which he states the question to have been left was this: After telling the jury that the burden of proof lay upon the prisoners, he directed that if they were satisfied that there were several distinct or

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be observed. These forms are devised for the detection of guilt and for the protection of innocence. In the present instance the defence does not rest upon a mere technicality, but upon the sacred maxim that "no one ought to be twice vexed for the same cause." The only question is, whether the defendants might, under the former indictment, have been lawfully convicted of the assaults for which they are now prosecuted, and it is the very same question which we should have had to consider if they had been convicted of these assaults, and the validity of that conviction had been referred to this court. A majority of the judges appear to think that the general acquittal was proper; but I am humbly of opinion that the second trial was unnecessary and unlawful. The case entirely depends upon the construction of the stat. 1 Vict. c. 85, sect. 11. Let us first consider the mischief which this enactment was intended to remedy. At common law, a person indicted for a felony which involved an assault must have been wholly acquitted, although proved to have committed the assault charged in the indictment, and given in evidence by the crown as the means of committing the felony, if his attempt to commit the felony was not fully accomplished, or if a felony had been committed to which the assault did not conduce, or if no felony had been committed or attempted. This was found to be extremely inconvenient; for the prisoner, proved to have committed a grave offence of which he was accused, either got off with perfect impunity, or a new indictment was preferred against him for the same assault, and the same evidence was again given against him before another jury.

In the former event, public scandal was given by a failure of justice, and in the latter, the accused party was unnecessarily harassed, and unnecessary expense and trouble were occasioned by a second trial. I conceive that the object of the statute was to permit, in spite of the technical rule of the common law, which forbids, under an indictment for felony, a conviction for an offence amounting only to a misdemeanor, that wherever there is an indictment for a felony involving an assault, the prisoner may be convicted of the assault charged in the indictment and given in evidence as conducive to the felony, although he be acquitted of the felony, and whether the assault was or was not, in point of fact, conducive to the felony. This surely would be a very reasonable law, both for the sake of the public and of the prisoner. To my mind it is enacted by the following words: "On the trial of any person for any felony, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault, if the evidence shall warrant such finding." Soon after the act passed, a construction of it was contended for, confining its operation to cases in which the assault was committed in an attempt to commit the felony charged. For this construction plausible reasons were urged, but it was—I think very properly—overruled by several solemn decisions of the judges. Thus the quality of the assault, that it shall actually be conducive to the felony, is gone; and I must confess that I can conceive no other intelligible rule to go by than

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that the assault shall be charged and shall be given in evidence as conducive to the felony. With these conditions the party accused has ample notice of the offence which he has to answer, and an ample opportunity of vindicating his innocence. The statute certainly did not mean practically to give the prosecutor the advantage of adding to the indictment a count for an assault unconnected with the felony; but the rule which I would lay down admits of no such perversion. The assault must be an assault against the person, and included in the crime charged; if it be, then it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of an assault, should the evidence warrant such finding. I know not why a proviso is to be introduced that the statute shall not apply where evidence is subsequently given that the assault charged and proved as conducing to the felony did not conduce to it. In the present case, the assaults which are the subject of the second indictment for misdemeanor were expressly charged in the second and third counts of the indictment for murder, and they were actually given in evidence at the former trial, with the expressed purpose of proving the felony alleged in those counts. Moreover, when they were given in evidence, they were material and powerful proof that the crime of murder had been committed by the prisoners. Subsequently, medical witnesses of skill and credit swore that the death was caused exclusively by a blow on the head of the deceased, not shown to have been inflicted by either of the prisoners. Thereupon, my brother Talfourd most properly interposed, and advised the jury to acquit them of the murder. But, with the most sincere deference for his opinion, and that of my learned brethren who agree with him, I think he ought to have directed the jury that if they believed the medical witnesses, and acquitted the prisoners of the murder, they must direct their attention to the uncontradicted evidence proving the assaults, and find a verdict of "guilty" upon the portions of the indictment charging those assaults, should they think "that the evidence warranted such finding"—that is to say, if they believed the uncontradicted and unsuspected witnesses for the crown, who swore to those assaults. Being once connected with the felony, and sufficient to prove it, if the death were not imputed to another cause, I do not understand when or how they were disconnected from it and became independent and distinct assaults. Juries, in practice, defer to the opinion of the judge upon such an occasion, and a formal summing up becomes unnecessary; but if there be any evidence to go to the jury from which they might draw an inference of guilt, in strict law it is supposed to be submitted to them. The assaults proved against the prisoners were connected with the felony till the verdict of not guilty was pronounced. But it is before the verdict is pronounced, as I conceive, that the judge is to tell the jury that if they acquit of felony they may convict of assault. It is not by the verdict of "not guilty of the felony" that the judge is prevented from drawing the attention of the jury to the minor offence. The statute clearly supposes the direction to be given to the jury that if they acquit of the felony, they may find a verdict of guilty of assault, the evidence warranting such finding. In this case, morally speaking,

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the jury would not have been justified in disbelieving the medical evidence, and concluding that the assaults of which the prisoners were proved to have been guilty caused the death. But cases may easily be imagined in which the jury would be justified in disbelieving medical evidence, and, in spite of it, properly finding a verdict of guilty of the murder.

How, then, can we lay down a rule that assaults once connected with the felony are to be disconnected from it by a medical opinion that they did not conduce to the death? It was hardly contended at the bar that the prisoners might not have been convicted of the assaults if it had turned out to be a case in which no felony appeared to be committed; and I cannot understand how the case is less within the statute because the evidence led to the belief that a murder had been perpetrated in which the prisoners were not implicated. A good deal of stress was laid upon the power given by the 8th section of 1 Vict. c. 85, to sentence any person found guilty of an offence within the act to hard labor and solitary confinement. But this argument was exhausted when the judges determined that the enactment about convicting of assault was not limited to assaults in an attempt to commit a felony. The power of punishing by hard labor and solitary confinement is only discretionary; and the legislature probably thought that it might often be usefully exercised if the assault was connected with the commission of a felony, although proof were not given that the felony was attempted. In the present case, had there been a conviction for the assault at the first trial, simple imprisonment might have been generally considered an inadequate punishment for the delinquency established. I do not think it necessary to refer to the various decisions which have been commented upon by my learned brothers who have preceded me. I will content myself with observing that the most recent of these, *Reg. v. Birch*, seems to me to be an express authority for the construction of this statute. There no felony had been consummated, and the jury expressly found that the assault had not been committed with intent to rob. Yet the judges unanimously held that the prisoner had been properly found guilty of the assault. Could it have made any difference in that case if there had been additional evidence that after Birch, the prisoner, struck the prosecutor, a stranger was seen to give him an additional blow, to take his purse, and then to escape? I must beg the particular notice of my brethren to the replication to the plea of *autrefois acquit*, on which the issue is joined, that "the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment." The case submitted to us expressly states that the assaults for which the second indictment was preferred were given in evidence at the former trial; that "the counsel for the prosecution, in opening the case to the jury on the former trial, had opened these different assaults as conducive to the death;" and that "it was not shown on the second trial that there were any other assaults committed but those which had been given in evidence on the former trial." I am bound to say, upon this statement, the prisoners were acquitted of the same identical assaults charged in the present indictment, and are therefore entitled to our judgment. I need only very

briefly advert to the argument urged by the counsel for the prosecution, that even upon the supposition that the prisoners might have been convicted of the assaults under the first indictment, yet, as the judge did not submit this question to the jury, the general acquittal does not entitle them to plead *autrefois acquit* in bar of the indictment for misdemeanor. But if they might lawfully have been convicted of the assaults at the first trial, they were then in hazard, and they are not, to be again put in hazard of being convicted upon the same charge. There would be no safety for mankind if the benefit of a former acquittal might be done away with by inquiring into the terms in which the judge summed up at the former trial, although the indictment, and the evidence then given, sought to convict the prisoner of the same offence for which he is again prosecuted, and, if he were guilty of it, there was then an opportunity of establishing his guilt. It is only the ignorant and the presumptuous who would propose that a man shall be liable to be again accused after a judgment regularly given pronouncing him to be innocent. According to this novel doctrine, the crown might a second time prosecute for high treason a person who has been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence. I have only further to observe, that I think the direction of the learned judge at the last trial was exceptionable; and I hardly see how the conviction under it can be approved by any who are not of opinion that there can only be a conviction of assault under 1 Vict. c. 85, where the assault was in an attempt to commit the felony. He told the jury that, "if they were satisfied that there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown." I am of opinion that he should only have directed the jury to find for the crown if there were any assault in evidence which was not included in the former indictment, and not offered in evidence at the former trial as part of the transaction, so that it might be considered an independent and distinct assault unconnected with the felony. As he directed the jury, they were bound to convict if there was any assault in evidence which did not in fact conduce to the death of the deceased, however it might have been connected with the felony, and, indeed, with whatever intent it might have been inflicted. The result of the evidence at the first trial is supposed to be that the death was caused exclusively by a blow subsequently given, which was not the subject of the second indictment. Upon this supposition, no prior assault could have conduced to the death. Therefore the jury at the last trial were obliged to find a verdict of "guilty," as none of the assaults proved did conduce to the death, although they were all offered in evidence as conducing to the death, and were substantial evidence to prove the murder. This seems to me not only to differ from my construction of the statute, but to put a narrower construction upon it than it has at any time received since the decisions that the assault need not be committed in an attempt to commit the felony. For these reasons, I think that the conviction

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ought to be quashed; but a majority of the court being of a contrary opinion, the conviction is affirmed, and the judgment which was respited will be pronounced upon the defendants at the next assizes for the county of Devon. I hope I may, without impropriety, express a wish that the legislature will speedily repeal or explain the enactment which has caused such confusion. Of course I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned brethren who differ from me; but I have not been able to gather from them any clear and certain rule for my future guidance, and, I am afraid, that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations.

*Conviction affirmed.*¹

¹ The case again came on, at Exeter, Wednesday, March 19, 1851, before Martin, B.

After the delivery of the charge, his lordship directed Robert Courtice Bird and Sarah Bird, his wife, to be placed at the bar.

On Mr. Slade and Mr. Cox coming into court, the male prisoner entered into a short but earnest conversation with them, and during the proceedings the male prisoner paid great attention, and repeatedly conversed with his wife, as if informing her of the various points. After the learned judge commenced addressing them, she appeared much distressed.

His LORDSHIP, addressing Mr. Slade, said, I understand you have something to say to the court.

Slade replied that he had not, as neither himself nor Mr. Cox had been instructed.

MARTIN, B., then said: Robert Courtice Bird and Sarah Bird, it is my duty to pass the sentence of the court upon you for an offence which now by law must be passed upon you; but in doing so I wish you to understand that I am exercising no discretion or judgment of my own, but I am merely carrying into effect the directions of the learned commissioner before whom you were tried, and the sentence is entirely his, and in no respect mine, and were it not that it must be satisfactory to you and the public to know the circumstances under which the sentence is passed, I should merely order the punishment to be recorded; but it is convenient that all should know the practice of the criminal law. At the Spring assizes of 1850, you were tried here for the alleged murder of Mary Ann Parsons. Evidence was given against you, showing, as I am informed, that you had committed various acts of cruelty upon this girl, but clearly showing that she died from a blow of

which no proof was given that either of you inflicted it. The inevitable consequence was, that the jury were directed to acquit you. At the last Summer assizes you were indicted for a misdemeanor, in assaulting Mary Ann Parsons with intent to injure her, and with intent by such injury to do her some grievous bodily harm. There were various other counts in the indictment. To that indictment you pleaded *autrefois acquit*, or, in other words, that you had been tried for this offence at the previous assizes, and acquitted; and, as by the law of England no person can be tried twice for the same offence, the learned commissioner who tried you was of opinion upon leaving a certain question to the jury, and so directed, that a verdict should be entered against you, but he reserved the question for the opinion of the fifteen judges. That opinion has been had, and a great diversity of opinion existed. There was a division of opinion among the judges; eight were of opinion the conviction was right, six were of opinion that it was wrong, and as I formed one of that minority, it is only necessary to state, that whatever my opinion may have been, or may be, I am as much bound to submit to the opinion of those eight judges as if it were the judgment of the House of Lords, and, in consequence of that judgment, you are now called up for sentence. Although you have had no opportunity of making your defence, and your story has never been heard, if you feel inclined to make any affidavits on your own part, stating the circumstances of the case, I am not disposed to pass sentence upon you at the present moment, but will send up the affidavits to the learned commissioner. I cannot but feel that you stand in the condition of persons whose case has not been heard. If you

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wish me to postpone the sentence until you can make affidavits, I will do so. On the other hand, I will proceed at once to state the sentence I am directed. I do not wish you to make your decision hastily. If you want half an hour, I am perfectly willing to give it you.

Slade. Had I been instructed, I should have asked your lordship to let us have our trial.

MARTIN, B. Then I should have been obliged to have decided against you, and drive you to a writ of error.

Slade. The expenses of which would have been so great that the prisoners would not have been enabled to take advantage of it.

Cox, who appeared for the female prisoner, then consulted with the prisoners, (for no attorney appeared in the matter,) and then said they would prepare affidavits.

MARTIN, B. You had better do so directly, and I will send them to Mr. Russell Gurney.

Rowe said he appeared on the part of the crown. He was not there to press severely upon the prisoners; at the same time it was his duty to see justice done, and without venturing to object to the course proposed, he hoped it would not be asking too much if he begged to be admitted to see those affidavits, and, if necessary, to answer them.

MARTIN, B. That may postpone the matter for some time.

Rowe. We came here prepared to meet a legal argument, and my application is that, if the affidavits are made, we may have the opportunity of seeing them, and of answering them if need be.

MARTIN, B. If you could have the affidavits handed to Mr. Rowe this evening, so that they may go to town to-morrow evening, so that the learned commissioner might have an opportunity of reading them and returning them on Monday, will that answer?

Rowe. We did not bring the witnesses here, as we believed the point of law was clear, and that your lordship would put them to error.

Cox said that the prisoners had sent for an attorney, and if he should receive the necessary instructions immediately, the drafts of the affidavits should be submitted to his friend this evening.

Rowe. That will be perfectly satisfactory.

MARTIN, B. Perhaps the better course will be for me to pass the sentence, and to make an application to the Secretary of State for a mitigation under the very pe-

culiar circumstances of this case. I feel it to be a great hardship that the prisoners should be punished without a trial, and with no opportunity given to them of answering or explaining the charge laid against them in this indictment.

Slade. That will meet the justice of the case, and avoid inconvenience.

Rowe made some observation which we could not catch.

MARTIN, B., then addressed the prisoners: I have only to say, and I may take this opportunity of publicly stating, that every thing that industry and ability could do in arguing your case by your learned counsel was done by them on your behalf, and that was the opinion of all the learned judges. It seems to be the opinion that the better course will be that I should at once pass the sentence, which, I repeat, is not mine, and that an application may be made to the Secretary of State; but the sentence is, that you be imprisoned, with hard labor, for sixteen months, (this being an imprisonment of two years from the trial in July last.)

The prisoners were then removed.

Above is given the conclusion of this remarkable case,—remarkable, because the prisoners have been sentenced and are now suffering punishment for a charge upon which *they have not been tried*. Such is the apparent injustice and anomaly of the English law, that although in cases of *felony*, if a plea of *autrefois acquit* is decided against a prisoner, he has then a right to trial *for the offence itself*; yet it is not so in a *misdemeanor*. There it has been held in England, that a prisoner has no right to answer over to the charge itself, but is to be treated as guilty and punished accordingly. *King v. Gibson*, 8 East, 107. *Regina v. Goddard*, 2 Ld. Raym. 922, Holt, C. J. 1 Chitty, C. L. 461. *King v. Taylor*, 3 B. & C. 502. But it is not so in this country; and if a plea of *autrefois acquit* or a demurrer is found against the defendant, he will be put to plead again to the indictment, and the trial will proceed as if no previous proceedings had been had. *Commonwealth v. Goddard*, 13 Mass. 455. *Commonwealth v. Barge*, 3 Pennsylvania, 262. *Foster v. Commonwealth*, 8 Watts & Serg. 77. *Ross v. The State*, 9 Missouri, 696.

In Tennessee, however, it seems to have been held that after a decision against the prisoner on a demurrer to an indictment for a misdemeanor, he cannot plead over as a *matter of right*; but the subject is discretionary with the court. *Bennett v. The State*, 2 Yerger, 472. See also, *State v. Shaw*, 8 Humphrey, 32.

Regina v. Dovey & Gray.

[Before JERVIS, C. J., PATTERSON, CRESSWELL, and ERLE, JJ., and MARTIN, B.]

REGINA v. DOVEY and GRAY.¹

Hilary Term, January 18, 1851.

Indictment for jointly receiving Stolen Goods — Proof of separate Acts of receiving — Conviction good against one.

D and G were indicted in a single count for jointly receiving stolen goods. It was proved that D first received some of the goods: evidence was then given that G afterwards, at a separate time and place, received another portion of them. The jury found both guilty:—

Held, that D and G could not properly be both convicted under the count for *jointly* receiving, on proof of separate acts of receiving; that as the evidence given against D fully satisfied the allegation of a receiving in the indictment, the evidence of receipt by G ought not to have been admitted; and that, consequently, the conviction was good as against D, but ought to be reversed as against G.

THIS was a case which was stated by the Chairman of the Quarter Sessions for the County of Hants, as follows.

At the Epiphany Quarter Sessions for the County of Hants, holden at Winchester, on the 30th of December, 1850, William Dovey and Elizabeth Gray were charged on an indictment, a copy of which is hereunto annexed, in the first count with stealing, and in the second count with receiving twelve turkeys, knowing them to have been stolen.

Dovey, and a man named Hodder, who had absconded, both resided at Brook, in the County of Hants, near the premises of the prosecutor, from which the property was stolen. They were both in company with others at a public house, at 11 o'clock, on the night the turkeys were so stolen, and at 8 o'clock, the following morning, they were seen together ten miles from Brook, on the road from that place to Salisbury, with a horse and cart belonging to Dovey. The same day, Dovey sold two of the turkeys at Salisbury, and the other prisoner, who resided at Salisbury, was proved to have disposed of the remaining ten at Salisbury on the same day. The prisoner Dovey made a statement that he was called up at 2 o'clock, A. M., in the night in which the turkeys were stolen, by Hodder, who brought the turkeys to him in a sack, and that he took them to Salisbury and sold them for Hodder.

The jury returned a verdict of guilty against both prisoners for receiving.

It was objected by the counsel for Elizabeth Gray, citing *The King v. Messingham*, 1 Moo. C. C. 257, that the prisoner could not be convicted, inasmuch as the indictment charged a joint receiving, whereas, the evidence showed separate acts of receiving; and at the suggestion of counsel, I then put it to the jury, whether they found a joint or separate receiving, upon which they returned the following verdict: "We find that William Dovey received, on the road between Brook and Salisbury, and Elizabeth Gray at Salisbury. The prisoners were not together at the time."

¹ 20 LAW J. Rep. (N. S.) M. C. 105.

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Sentence of imprisonment was passed on both prisoners, and execution respited.

Elizabeth Gray was admitted to bail, and William Dovey was remanded to prison, until the question on his conviction should have been decided.

The opinion of the Court of Appeal is prayed, whether, upon this verdict, the judgment given ought to be reversed in favor of both or either of the prisoners.

The case was argued by

C. Saunders, on behalf of Elizabeth Gray. There is only one count, charging the prisoners jointly with receiving the stolen articles. Both of them cannot be convicted upon this count, as the receipt by each was a separate receipt. *The King v. Messingham* is decisive on the point. One prisoner might have been convicted of the separate act of receipt.

[JERVIS, C. J. Is there any rule to govern our discretion in saying which prisoner is to be convicted?]

In *The King v. Messingham* both prisoners were found guilty. The receiving was first proved against the son, and then against the mother; and the question there was, whether the conviction could be supported against the mother.

No counsel appeared for the prisoner Dovey or for the prosecution.

JERVIS, C. J. The case which has been cited clearly lays down that two persons cannot be convicted of separate acts of receiving upon a single count, charging a joint receipt by the two. It also shows that the allegation of the receiving in the indictment having been satisfied by proof of the previous act of receiving by Dovey, the evidence of the separate act of receiving by Elizabeth Gray was not properly admissible. We are, therefore, of opinion that she is entitled to be acquitted. — *Conviction reversed as to Gray.*

[Before LORD CAMPBELL, C. J., PARKE and ALDERSON, BB., CRESSWELL and ERLE, JJ.]

REGINA v. WILLIAMS.¹

November 26, 1850.

Forging and uttering forged Warrant, Order and Request for Delivery of Goods — Setting out forged Document — Variance.

The indictment charged the prisoner with uttering, knowing the same to be forged, a certain warrant, order, and request for the delivery of goods, in the words and figures following: "Mr. B, — S. Pleas sen by bearer a quantity of basket nails a clasp. E. L."

It was proved that E. L. was a customer of B.'s, and had employed the prisoner in his service; and that the prisoner had delivered to B. a paper, as set forth in the indictment,

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which was a forgery of E. L.'s handwriting. The prisoner was convicted. On a case reserved it was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request:—

Held, that there was no variance, as the document being set out in *hæc verba* in the indictment, the description of it therein became immaterial.

THE prisoner was tried, before W. N. Welsby, Esq., (sitting for Mr. Justice Williams,) at the Chester Spring assizes, A. D. 1850, for forgery. The indictment charged the prisoner with forging, and in other counts with uttering, knowing the same to be forged, a certain order, warrant, and request for goods,¹ with intent to defraud William Bevan. Other counts charged the intent to be, to defraud Edward Lloyd. It appeared in evidence that Lloyd, who is an ironmonger, in Sydney Street, Manchester, was in the habit of buying ironmongery goods from Bevan, who was a smith and iron moulder, at Duckinfield, in Cheshire. Lloyd had, for some time before the commission of the offence, employed the prisoner to sell goods for him on commission. On the 22d of December, 1849, the prisoner presented to Bevan a paper, in the following terms, which was proved to be a forgery of Lloyd's handwriting:—

“Sidney Street, December 22, 1849.

“Mr. Bevan, S,—Pleas to sen by bearer a quantity of basket nails a clasp for
E. Lloyd.”

Bevan, on the faith of this document being genuine, gave the prisoner nails to the value of 11s., which he disposed of for his own benefit.

It was objected, for the prisoner, that the forged instrument was neither a warrant nor an order, but only a request for goods; and that, in order to satisfy the indictment, it must be a warrant and an order as well as a request. *The Queen v. Williams*, 2 Car. & K. 51, was referred to.

The prisoner was convicted on the counts for uttering, and the following questions were reserved for the judgment of this court: First, whether the forged paper was a warrant and an order as well as a request. Secondly, if not, whether the indictment was supported.

The case was argued (April 27) by

Mackintyre, on behalf of the prisoner. The instrument was only a request for the delivery of goods. The proof does not support the averment that the prisoner uttered an instrument which was a warrant, order, and request. The conviction is wrong, unless the instruments were all three. There are instruments which bear this threefold character. A check on a banker is a warrant, order, and request.

[*Parke*, B. There would have been no difficulty, if the indictment had alleged the uttering of one warrant, one order, and one request.

¹ In all the counts of the indictment the charge was with respect to “a certain warrant, order, and request.” Some of the counts alleged it “a certain warrant, order, and request, in the words and figures following;” and then set out the document which was put in evidence on the trial, *verbatim*.

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Lord Campbell, C. J. The forged instrument is set out in some of the counts. In those in which it is set out, does not the allegation mean, in substance, that the prisoner uttered the following instrument?]

The nature of the instrument would depend upon the relation between the parties. The allegations in the indictment, which describe its character and effect, are material. He referred to the following authorities: *The Queen v. Williams*. *The King v. Crowther*, 5 Car. & P. 316. *The Queen v. Gilchrist*, Car. & M. 224. *The Queen v. Newton*, 2 Moo. C. C. 59. 2 Russell on Crimes and Misd. 516.

No one appeared on behalf of the prosecution.

LORD CAMPBELL, C. J. We wish to look at the indictment before we give judgment. We conjecture that will remove all difficulty.

Cur. adv. vult.

The court now stated, that as, on the inspection of the indictment, it appeared that the instrument was set out *in hæc verba*, the objection failed, and that consequently the conviction was right.

Conviction sustained.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

DURING THE YEARS 1850 AND 1851.

THE BOLD BUCCLEUGH.¹

January 15 and 18, 1850.

Collision — Sale of Ship — Lis alibi pendens.

Collision in December, 1848, and a warrant of arrest issued in the same month, but never served, as the ship was removed out of the jurisdiction and taken to Scotland. In January, 1849, an action was entered, and the ship arrested at the suit of the same parties, in Scotland, and released on bail. In August, the ship was found within the jurisdiction of the Court of Admiralty, and arrested under a fresh warrant. Measures were then taken by the plaintiffs to abandon the action in Scotland, &c.; and that action, after opposition on behalf of the owner of the ship proceeded against, was finally dismissed in December. The ship was sold in January, 1849, to her present owner: —

Held, first, that the plaintiffs had a right to abandon the suit in Scotland, and that the plea of *lis alibi pendens* could not be maintained.

Secondly, that the change of ownership could not affect the liability of the ship.

THIS was a cause of damage, promoted by the owners and crew of the William against the steamship the Bold Buccleugh. The action was entered on the 27th August, 1849, and the ship arrested at Hull; on the 31st, bail was given, but under protest, and the ship released; and on the 3d October the act on protest was brought in. The allegations in the act were, that on the 30th January, 1849, a suit was commenced in the Court of Session in Scotland, on behalf of the owners of the William, against the *then* owners of the Bold Buccleugh, for compensation in respect of damage; and that, in pursuance of the writ of summons issued in that suit, the Bold Buccleugh was arrested in Leith Harbor, and released on bail; that the said suit, and also a suit instituted in the same court by the owners of the cargo on board the William, was still pending, and expected to come on for hearing in the month of December, 1849, and that the cause of action is the same in the said Court of Session as in the High Court of Admiralty; that on the 26th June, 1849, the owners of the Bold Buccleugh, by bill of sale, &c., sold the said ship to her present owner. The answer pleaded, that the collision

The Bold Buccleugh.

having taken place in the Humber in December, 1848, an action was entered in the Court of Admiralty on the 19th of that month, and a warrant of arrest extracted and sent down, but the Bold Buccleugh had, before the warrant reached Hull, quitted that port, and had not come within the jurisdiction of the court again until the time thereafter alleged; whereupon, as her owners refused to give bail, the suit was instituted in Scotland. The answer then denied that such suit was still pending, and alleged that the Bold Buccleugh, having in August last been found within the jurisdiction of the court, was arrested under a fresh warrant, when the suit in Scotland was discontinued; that the present owner of the Bold Buccleugh was, or might have been, aware of the outstanding claim against that ship by reason of the said charges, and did or might have provided accordingly. The reply denied that there was no suit now pending in Scotland, and alleged that the present owner of the Bold Buccleugh, being advised that he had an interest to oppose the dismissal of such suit, on the 6th November, the agent for the defendants in that suit alleged that the defenders had an interest to oppose the motion for leave to abandon the suit, and intended to sist another party, to wit, the now owner, interested to maintain the defence; whereupon, the judges then present allowed the defenders to put in a minute of answer between that day and the 8th, and also a minute proposing to sist the new defender referred to, but that, in consequence of the defenders having failed to lodge such minute, the court dismissed the action; that such dismissal, however, is not final, and application has been made to recall the order, and the dismissal now remained subject to the order of the court to be made in the matter of the said application. The rejoinder alleged that the question of dismissal was argued and the suit finally dismissed, on the 6th December. Upon these pleadings, and the evidence in support of the allegations therein made, —

Haggard and Jenner, for the protest, contended, that, first, there was a *lis alibi pendens*; secondly, the bail was a discharge of the ship, and the ship could not be arrested a second time; and, thirdly, the present owner was not responsible. They cited *The Druid*, 1 W. Rob. 391.

Addams and Robinson, contra. If the purchaser has been imposed upon, he has his remedy against the vendors. The chief ground of protest, the *lis alibi pendens*, fails entirely. The suit in Scotland has clearly been abandoned; and the owners of the *William* have a right to institute their suit in the court within whose jurisdiction the damage and cause of action was done.

DR. LUSHINGTON. It appears from the proceedings in this case, that on the 14th December, 1848, the Bold Buccleugh came into collision with a vessel called the *William*, whereby the latter was sunk. This disaster occurred in the River Humber; and it is alleged, and not denied, that the Bold Buccleugh was a steamer trading

The Bold Buccleugh.

between Leith and Hull. On the 19th December an action for damages was entered in this court on behalf of the owners of the William, and the warrant forwarded to Hull; the steamer, however, had left before its arrival, and consequently she could not be arrested. The owners of the Bold Buccleugh were applied to, to give bail to the action entered in this court, which they declined to do. The Bold Buccleugh still continuing out of the jurisdiction of the court, the owners of the William, who, it seems, were resident in this country, commenced a suit against the owners of the steamer in the courts of Scotland; the steamer was arrested, and bail was given. In the latter end of August, 1849, whilst these proceedings were pending, the Bold Buccleugh was found within the limits of the jurisdiction of this court, and arrested by another warrant. The owners of the Bold Buccleugh gave bail, but under protest, and an act on petition was brought in. The matters contained in this act are not, strictly speaking, facts on which to found a protest; in truth, the principal averments are pleas in bar, pleas to estop the exercise of an admitted jurisdiction. But this mode of proceeding is a convenient one, and it matters little what name be given to it. Then what are the contents of this protest? Briefly expressed, they are, first, that at the time of the arrest there was what is termed a *lis alibi pendens*; secondly, the ship was sold in June, 1849, prior to the arrest under the authority of this court. Now, as to the *lis alibi pendens*, it is quite true, as a matter of fact, that such was the state of things at the commencement of the present suit; and it is, as a general principle, quite true, that the court would not allow two suits for the same purpose to be maintained at the same time before two competent jurisdictions. But there are some peculiarities in this case which require to be considered. It is true, the action is in some respects in the nature of a transitory action, but not exactly so in relation to this court; the cause of action arose within the jurisdiction of the court. The most powerful arm of the court is directed against the ship herself in all cases; and the ship was originally, at the time of the collision, within this jurisdiction, and she was withdrawn by the owners from the jurisdiction attempted to be exercised, and withdrawn also from her usual occupation. The result of this was, that the English owners were compelled to proceed in Scotland. I do not say unduly compelled, because, where the property is removed, the action must follow the person; and the Scotch owners, the owners of the Bold Buccleugh, had, perhaps, a right, if they could, to restrict the litigation to their own courts; still less do I mean to say that perfect justice might not be had before the Scotch tribunals. But, however this may be, the cause was removed from what was the original forum, and by compulsion against the English owners. I think no doubt can be entertained, that the English owners had a perfect right to abandon such suit in Scotland, and to proceed against the ship, if she came within this Admiralty jurisdiction. Had they discontinued the action in Scotland prior to the arrest of the vessel in August, I am of opinion, beyond all doubt, that I must have allowed this action to be prosecuted. There are many

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authorities to be found in the books as to the practice in a case of *lis alibi pendens*, but none that I am aware of, and none have been cited, which deny the liberty of a suitor to abandon an action before one jurisdiction, and resort to another equally competent. But it may be said that at the time of the arrest of the ship there then certainly was an action pending, and not abandoned; for, in my previous observations, I have alluded to the case of a suitor abandoning an action, and then afterwards commencing a new one. There certainly was in this case an action actually pending. Here, however, arises another peculiarity in the very nature of the transaction, and I think well deserving of consideration. The English owners could not tell when the ship would come within the jurisdiction of this court; they could not with prudence abandon the suit in Scotland, on the mere chance that they would be able to proceed here. They did arrest her at the very first opportunity, and did withdraw the action in Scotland at the very earliest time it was possible to withdraw it. Under all these circumstances, I am of opinion that the plea of *lis alibi pendens* cannot be sustained. The second objection is, that prior to the arrest the ship had been sold; and it is unjust towards the purchaser to allow the ship he has bought and paid for to be proceeded against in this suit. Now, it is quite manifest that mere change of property does not exonerate the ship from liability to be sued; no one can reasonably contend that a sale after a collision, with a knowledge of it, would produce that effect, because, if so, the owners of a vessel doing damage, would have nothing to do but to sell her, for the purpose of taking from the parties aggrieved their best security for compensation. Therefore, as a general precedent, I am prepared to deny that a mere transfer of a vessel, which has been guilty of doing damage, can at all diminish the liability of that vessel to be arrested.

It has, however, been urged, in the present case, that the ship, having been bailed in a proceeding before a court in Scotland, was released from all responsibility; and it is true, I apprehend, that she could not have been again seized in that suit by the present plaintiffs, namely, in the suit in Scotland. But I do not think that that circumstance affects the proceedings here. There is no evidence even to the effect that the present owner knew any thing as to the action or bail at the time he made the purchase. What he did know is left, I am sorry to say, very much in the dark. If he knew there had been a collision, then certainly he might have protected himself, either by not making the purchase, or by some other precaution. But it appears that this gentleman, the present owner of the vessel, was advised to commence a proceeding in the court of Scotland for the purpose, if he could, of protecting himself; the gist of which, I apprehend, was to endeavor to induce the Scotch court not to allow the suit to be abandoned, and to keep before it the bail which had been given to answer the action which had been brought in Scotland.

Now, I think it hardly necessary for me to enter minutely into a consideration of what was done in Scotland, because, of course, I am bound by the result of their proceedings; and it is not for me to

examine into the reasons upon which those proceedings were grounded. So far, however, as I am able to conjecture, the nature of the proceedings was of this kind: There is a head of law in Scotland, well known, called the "*jus quasitum tertio*;" that is, where two persons enter into a contract with each other, and there arises an interest in a third party. There was, I presume, an attempt made to detain the bail, for the benefit of the purchaser of this vessel, but that attempt failed. Therefore, of course, I must come to the conclusion, that in reality this person had not, by the law of Scotland, any right or interest to detain the bail in that court, and I must proceed on that view of the case. If it be true, then, in the present action, that the mere act of transfer of the vessel will not release the purchaser—if it be true that a competent court has decided that he had no interest in the bail actually given in that transaction, in what way am I to come to a conclusion favorable to that purchaser, and say that he is released from his liability? In the course of the argument, reference was made to the case of the *Druid*. The whole of that judgment proceeded upon a very peculiar state of circumstances. The master of a steamtug wilfully ran into a foreign vessel, and the question which the court had to decide was, whether the owners of the steamtug were responsible for the wilful act of damage done by the master. Any observation of mine which did not directly bear on that question was in the nature of an *obiter dictum*, and must be taken to apply only to the circumstances of that case. In that case, the words I used were: "In some cases it is obvious that a ship may be liable where the owners would not be personally responsible; as, for instance, in cases of lien upon a ship for seamen's wages or bottomry bonds, when the lien has been acquired before the existing owners made their purchase. Against such liabilities the purchasers must protect themselves by caution, or by contract at the time of sale; as, against the enforcement of the outstanding lien, in a proceeding against the ship in this court, they would have no legal defence upon the plea that the existence of the lien was unknown to them at the time the purchase was effected. Again, it might possibly be that an innocent purchaser may be liable to have his ship arrested and sold for the payment of damages in a case where the former owners would have been responsible, and the damage was occasioned before the purchase was made. But upon this point I give no opinion whatever. In the case above mentioned, it is to be remembered that the liability must be assumed to have attached upon the ship prior to the time when the ownership vested in the existing owners. In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms: the ship is not liable if the owners are not responsible; and, *vice versa*, no responsibility can attach upon the owners if the ship is exempt, and

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not liable to be proceeded against." I am not prepared to say that there is any thing in that judgment which I repent having uttered, nor does it appear to me that any thing which I said on that occasion in any degree whatsoever operates on the present case. I was anxious, in the course of these proceedings, to know really what was the state of the case with regard to this purchaser — what measures he had taken to protect himself against possible liability to the action for the damage. But really the papers themselves afforded no satisfactory information at all; and when I applied to counsel for something in the nature of explanation, I understood him to say that the original vendors of the ship had been guilty of something little short of misrepresentation, in telling him that there had been an action against the ship for damage, but it was altogether settled. However that may be, if he had any such information, it was his duty to make inquiry, and to protect himself against any consequences that might ensue. This was not a case of inevitable ignorance; for this was a purchase entered into with some knowledge, at least, that there were circumstances which rendered the ship liable to be arrested. Now really, I think, on every principle of justice, I am bound to overrule the protest. I do so with great satisfaction to my own mind, because I do not see that the present owner will sustain any inconvenience, or suffer any loss. It is not alleged that the original owners are insolvent, and they must make good all the loss that may be incurred. Under these circumstances, it is but ordinary justice that I should overrule the protest, and direct the parties to appear absolutely, and they must pay the costs.

THE ALFRED.¹

January 19, 1850.

Collision — Report of Registrar and Merchants — Evidence of Damage and Repairs.

In considering objections to the report of the registrar and merchants, in a cause of damage, the court forms its opinion upon the whole of the evidence, whether laid before the registrar and merchants, or brought in subsequently; and will, although inclined to confirm the report, especially in matters within the practical knowledge of the merchants, direct the report to be reformed.

This was a cause of collision, in which the court pronounced for the damage, and referred the damage, in the usual manner, to the registrar and merchants. They brought in their report, disallowing certain items in the shipwright's and blacksmith's accounts, in the sums charged for wages and provisions during the ship's detention whilst under repair, and for loss of employment of the ship. The report was objected to, on behalf of the owners of the ship repaired, by

¹ 14 Jur. 155.

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Addams and Robinson, submitting that the evidence did not justify the deductions.

Jenner and Bayford, contra, contended that the court would confirm the report, which was made by persons dealing with subjects they were practically acquainted with, in the same way that the court adopted the opinions of Trinity masters in questions of nautical skill.

DR. LUSHINGTON. There can be no doubt that the owners, whose property has been injured in consequence of this collision, are entitled to be placed in the same situation in which they were before the act of the wrong-doer; but, of course, it is also true that they are not entitled to any thing beyond a just compensation. In the present case, objections have been taken to the report of the registrar and merchants, the case having been referred to them to report, in the usual manner, what was the extent of damage which had been sustained by the complainants in the cause. The registrar and merchants, in the exercise of their judgment, have thought fit to make certain very considerable deductions, which I must presently enumerate. The question for the determination of the court is, whether such deductions have been rightly made. With regard to the principle upon which the court must proceed, I cannot quite accede to the arguments of counsel in support of the report. I apprehend, that however incompetent I may be to discharge the duty devolved on me, yet that it is a part of my duty, of which I am not entitled to divest myself, to form my own opinion, from the evidence laid before me, as to whether the items objected to have or have not been properly disallowed. I do not think that the instance which has been put, namely, the case where the court is assisted by Trinity masters, is either correct in point of fact, or apposite to the point in question, because I must say, that I never yet pronounced a single decree, when I was assisted by Trinity masters, in which I was not perfectly convinced that the advice they gave me was correct. If I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, I should pronounce a contrary decree. The custom of the court, in asking the opinion of the Trinity masters, is to request them to state their reasons and explanations, and if these explanations are not satisfactory to the court, the court does not take them. The court never allows persons, perhaps inexperienced in the administration of justice, to raise inferences from a supposed state of facts, which does not appear in the cause. It fortunately has happened, that in but very few instances has there been a difference of opinion, and in no case have I pronounced any judgment except it was my own. Now, upon the present occasion, the court undoubtedly is disposed, in the first instance, to receive the report of the registrar and merchants with the greatest inclination to believe that it is correctly made, because the court has, from experience, well known the pains, labor, and judgment bestowed in making these reports, which are very seldom objected to, and which, I believe, have been made with the

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greatest satisfaction to the public at large. But if a case is brought before me, and it should so happen that my judgment differs from that of the registrar and merchants, I have no other alternative than to follow the dictates of my own opinion, and I am prepared to do it. Now, upon the present occasion, there are items disallowed by the registrar and merchants. For instance, there are the shipwright's and blacksmith's accounts, losses from the non-employment of the vessel, and matters of that description. Now, it has been argued, and very strongly pressed upon the court, that the registrar has had the assistance of merchants experienced in these matters. That proposition is not altogether, as I think, correct. I apprehend that merchants have very great experience in estimating what would be the freight a ship would earn, great experience in judging of the majority of items which are found contained in this demand; but I apprehend the best judges of what repairs would be necessary in consequence of a collision, and whether they are justly charged, would be shipwrights and persons accustomed to ship building.

[*The Registrar.* We always have that assistance; we had it in this case. It was the judgment of a shipwright, the surveying being compared with the repairs, that more had been done, and more charged for, than was justifiable.]

Then the case comes to this — the observation I made as to the registrar and merchants is true in itself, but they often, and properly, avail themselves of some shipwright of respectability, whom they bring in to assist and advise them. Now, what was the evidence before the registrar and merchants upon which they had to decide? It consisted of the protest, four surveys, two affidavits, and the bills and receipts. It has been said that they decided with reference to the protest and surveys. I confess that does not appear to me to be the best evidence in the case. Protests are drawn in divers ways. At one time great care and caution are exercised, at another these qualities are absent. I think a protest is not the best criterion of the damage actually done; at the same time, it is right I should say, the protest in this case is more detailed, and more carefully drawn, than the great majority of protests that come before the court. With regard to the surveys, all I am told is, that, upon comparing them with the various bills and charges made, it would appear that the latter were excessively exorbitant. I have looked at the surveys and bills, and without the assistance of some explanatory evidence I am unable to comprehend how the proposition is made out, that the former are incompatible and inconsistent with the latter. But they are not the best evidence in the cause — the best evidence would be the testimony of persons who saw the damage done to the ship, and were capable, in consequence of their practical experience in shipping matters, of estimating what damage was necessary to be repaired in consequence of the collision, and what would be the expense thereof. I think the registrar and merchants were left, on the present occasion, in a predicament in which they ought not to have been placed, especially if it was intended to oppose the charges contained in the bills. They ought to have been furnished with the evidence of some individuals

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of experience. The owners of the ship doing the damage, residing in the immediate vicinity of Portsmouth, might have produced the testimony of persons to impugn the bills, if they could be so impugned. But in what state were the registrar and merchants left? There is the affidavit of Mr. Gibbon, who swears that the *Argus* arrived at Portsmouth on the 15th February, and was detained there during and for such repairs till the 6th April; that certain work was done to her irrespective of the said repairs, whereby, however, no detention was occasioned to her, the same having proceeded contemporaneously with the said repairs; that the schedule annexed to his affidavit contains a full and true statement of the expenses rendered necessary by the collision. Unless this gentleman is grossly mistaken, he certainly furnishes strong evidence as to the repairs done. But a great deal of comment has been made upon the subject of there being other repairs done at the same time besides those consequent on the collision. I apprehend that, almost on every collision which takes place, the owners avail themselves of the opportunity of doing other repairs, which may then be effected at less expense to themselves. If they attempt to include these repairs in the damage done, they are guilty of fraud; but if they avail themselves of that opportunity without injury to the persons who pay the repairs consequent on the collision, certainly no blame is imputable to them; but it is quite right that the registrar and merchants should exercise their vigilance, and see that no greater charge is brought against the defendant than he is justly liable to pay. The only other affidavit before the registrar and merchants states the history of the ship from the beginning to the end, and the wages due. *Prima facie*, the evidence produced on the part of the owners of the *Argus* was sufficient; but, on the other hand, there was no evidence produced by the owners of the *Alfred*, and there was no attempt to clear up doubts or difficulties, except by inference from the surveys, which surveys it does not follow of necessity included every thing which ought to be done.

The case now comes before me with additional affidavits on behalf of the owners of the *Argus*, and two on the part of the owners of the *Alfred*. I will take the latter first. There is the affidavit no doubt of a respectable gentleman, named Snook, a shipbuilder in this town. He states, that he has attentively perused the protest and surveys, and he comes to the conclusion, and most positively makes oath, that very extensive repairs have been done to the *Argus* beyond those stated in the protest and surveys to be necessary to make good the damage sustained by the collision. In the first place, he points out none of these repairs, he never saw the ship, and he had no means of forming an accurate judgment at all. Then he states that he could have executed the repairs set forth in the protest and surveys in five days, and afloat. If this affidavit be true, I apprehend the registrar and merchants have acted most liberally towards the owner, for the repairs could not have come to one fourth of the charge allowed. I must say that I think this mode of swearing is rather dangerous. Mr. Laing goes over the same ground, and comes to the same conclusion upon that evidence. He says, that "the respective sums of 216*l.* 6*s.*

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9*d.* and 21*l.* 17*s.* 7*d.*, which have been allowed by the registrar and merchants, are most ample and liberal," — that is so far well, — "and much more than could have been charged for repairing the damage sustained in the said collision." So that, take the affidavit of this gentleman, the registrar and merchants made a mistake the other way, and I ought to send back the report for them to make a diminution. I must say, that these affidavits, especially made as they are by gentlemen who never saw the vessel, and know nothing about it, are not very satisfactory to my mind. But the evidence does not stand contradicted. I hold in my hand other affidavits, and I must ask upon what ground I am to assume that the gentlemen who make them are unworthy of credit? They are Mr. S. W. Garratt, Mr. Thomas White, and Mr. John Oakshot, and *prima facie* they are entitled to reasonable credit. They were employed in repairing the Argus, and they swear that the whole of the shipwright's account, amounting to 308*l.* 7*s.*, and the whole of the blacksmith's account, amounting to 34*l.* 11*s.* 2*d.*, were justly and truly incurred and disbursed in replacing and repairing the losses and damages sustained by the Argus in and by the collision. They state, that the other work was done, that great care was taken to keep the accounts separate, and that one item which was first charged in the private bill was by mistake copied into the other; but, I apprehend, that fact does not go to invalidate their general evidence. The next affidavit is made by Mr. Garratt, Mr. Cloughton, and Mr. Oakshot. Mr. Oakshot makes oath, that, in conjunction with Mr. White, he made four surveys of the vessel, and she was so severely strained and injured throughout that the course recommended by their third and fourth surveys and reports was absolutely necessary for her safety, in prosecuting the voyage on which she was chartered.

[*The Registrar.* It might have made a great difference if these affidavits had been before us.]

No doubt it would. The deponents all make oath that the utmost care was enjoined by the agent and captain of the brig, and was exercised by them, to avoid every possible delay and expense; that the time unavoidably extended to the 6th April; and that the idea of repairing the damage whilst she was afloat would have been utterly impossible and absurd: the whole of her hull and bottom required calking thoroughly. There are two other affidavits, which relate to the compensation for freight. With these affidavits I do not think that the court has any alternative but to make alterations in the report made by the registrar and merchants. I must refer the report back, with directions to restore the shipwright's bill from 216*l.* 6*s.* 9*d.* to 308*l.* 7*s.*; the blacksmith's bill from 21*l.* 17*s.* 7*d.* to 34*l.* 11*s.* 2*d.*; the wages of the master and crew from 48*l.* 10*s.* 4*d.* to 59*l.* 3*s.* 4*d.*; the provisions for the men from 30*l.* 15*s.* to 37*l.* 10*s.* The last item in dispute is for the detention of the vessel, which has been reduced from 2*l.* 2*s.* to 13*s.* 4*d.* for each day. That is a subject of which the merchants were peculiarly able to form a judgment, and I shall not disturb that deduction. I will only add, that the court might feel itself in great difficulty in having to give an opinion on items on which it has no practical knowledge; but I do not find myself in that difficulty

The Oriental.

here, because I have the affidavits of competent persons, and they are contradicted by nothing but inferential evidence. I do not think the protest and surveys are sufficient to show all the damage done to the ship, and for which compensation is to be made. It may be so, or it may not; but I am not satisfied that that is altogether a principle which I should venture to adopt.

Addams. The court will, I presume, give the costs of the present proceedings.

Dr. LUSHINGTON. Yes.

THE ORIENTAL.¹

November 24, 1849, and March 25, 1850.

Bottomry Bond—Agent.

There are cases in which an agent may take a bottomry bond.

A ship, damaged on leaving New York, returned to that port. M., who had acted as agent for her owner, gave the owner notice of the accident, and of his intention to get the ship ready for sea again as soon as possible. The owner communicated with M., and with the ship's master, but provided no funds for the expenses; there was no evidence that the owner or master had credit at New York. When the ship was ready for sea, the master, not being able to pay for the expenses, advertised for a loan on bottomry; and M.'s offer being the lowest, the bond was given:—

Held, that the bond was valid.

THE facts of this case are fully stated in the judgment.

Sir J. Dodson, Q. A., and *Bayford*, for the bondholder. There are two questions in this case. First, whether Miln was the agent of the owner; secondly, whether, admitting him to have been such, he was thereby disabled from advancing money on bottomry. As to the first, which is a question of fact, the depositions and the letters, the evidence in the cause, show he was not the agent. As to the second, which is a question of law, an agent is not bound to advance money on the personal security of his principal, nor is he disabled from lending his own money on good security as bottomry, provided he acts fairly. *The Hero*, 2 Dods. 139. *The Augusta*, 1 Dods. 283. *Weston v. Foster*, 2 Bing. N. C. 693. *The Tartar*, 1 Hagg. 1.

Robinson and *Twiss*, contra. Admitting the argument on the other side upon both points, still, to support a bond taken by a person acting in some degree as agent, or in correspondence with the owner, you must show that he gave notice to the owner, which is not even pretended to have been done in this case. But the evidence shows that, throughout the whole transaction, Miln acted as the agent of the owner; he undertook the management of the ship and her

¹ 14 Jur. 336.

concerns and repairs; and at the very last moment, when she was on the point of sailing, forced the master to give him this bond, though he knew the master had credit, and might have drawn bills, and though he (Miln) might himself have drawn bills, on the owner in New Brunswick, or on the owner's agents in England.

DR. LUSHINGTON. On the 12th March, 1849, a bottomry bond was executed by the master of this ship for the sum of 1393*l.* 10*s.* 7*d.*, purporting to bind the ship, freight, and cargo. It was given at New York under the circumstances stated in the bond, the ship belonging to St. John, (New Brunswick.) In February preceding, she had left New York, bound for Liverpool, and struck on a bank near the outer bar of the harbor of that city. She was brought back, and very large expenses were incurred for repairs and other matters. It was alleged that the master, being unprovided with funds, and having no credit himself, nor any on account of his owners, applied to Mr. Miln to advance the necessary funds on bottomry, which he accordingly did, at 18*l.* per cent. The vessel arriving in this country on the 20th April, and the money not being paid, an action was commenced on the 25th April on behalf of the holders of the bottomry bond. It is not denied that the bond was executed by the master, nor are the principal facts recited in the bond alleged to be untrue. The validity of the bond was impugned on other grounds, which I must now proceed to examine. It was stated in the answer to the act that Mr. Miln, to whom the bond was granted, was the agent of the owners at New York, and Messrs. Cannon & Co. agents at Liverpool; that the master was authorized to draw bills on Messrs. Cannon & Co. for the necessary disbursements of the ship, and that such his authority was well known to Mr. Miln. In proof of this averment, it is alleged that Mr. Miln had, on a previous voyage to New York, sold the cargo, when the vessel was arrested, and caused the master to draw a bill on Cannon & Co. for the balance of the disbursements, and that such bill was duly paid. The answer further states, that the master proceeded with the unloading of the ship and repairs, expecting Mr. Miln would, "as a matter of course, and as usual," advance the funds required upon a bill drawn by him upon Cannon & Co., or upon the owner; that no allusion was made to a bottomry bond until the 7th March, when the ship was ready for sea, and then Mr. Miln induced the master to execute it by divers representations. The substance of this defence is, that Mr. Miln was the regular agent of the owner, and therefore, and because the master's bills for the expenses would be honored, a bond taken by him would be invalid. It is necessary, in the first instance, to consider a little what the law is with regard to an agent making advances and taking a bottomry bond. That an agent cannot, under any circumstances, take a bottomry bond, is a proposition which, I think, cannot be maintained as universally true. There can be no obligation on a merchant merely because he takes upon himself the office of agent, to advance, to any required extent, his own funds for the repairs and outfit of a vessel consigned to his charge. The advance of money is no part of the contract into which he

necessarily enters when he becomes an agent. To this extent I am fortified by the judgment of Lord Stowell, in the case of *The Hero*, 2 Dods. 139, cited by the queen's advocate in the course of the argument. Independently of that high authority, I think, upon all principles of just reasoning, there can be no such general obligation to advance; but though an agent is not bound to make advances, unless he deems it prudent to do so, it does not follow as a necessary corollary that he has a right to take a bottomry bond; neither does it follow that in all cases he would have the same right to take a bond as a person wholly unconnected with the ship. I think that the true legal line of demarcation lies between the two extremes. In Lord Stowell's own words, "cases may possibly arise in which an agent may be justified in so doing," that is, in taking a bottomry bond. The true question is, whether the facts attending the taking of this bond constitute such a case.

Having made these remarks upon the legal effects resulting from agency, I have now to consider the fact of agency. Besides the averments to which I have referred, there are many other very material averments to be found in the reply on behalf of the bondholder, which have not been contradicted on behalf of the opponents of the bond. From the evidence it appears that Mr. Miln had acted as agent for Mr. Wallace, the owner of this ship, on several occasions during the last five years, but I do not find that there was any regular appointment of him as agent. If, however, he had been regularly appointed, such a circumstance, standing alone, would not make it a part of his duty to advance funds on the personal credit of Mr. Wallace, nor make him incapable of taking a bottomry bond. Mr. Miln believes, and in his affidavit deposes, that his employment, whatever its nature was, ceased when the ship first sailed, and before she got aground. I cannot but conclude that he was acting as agent, so far, at least, as justly to induce Mr. Wallace so to consider him, as the correspondence clearly proves he did. The whole tenor of Mr. Miln's letter to Mr. Wallace, dated the 26th of February, 1849, is that of an agent to his principal. That letter is in these words: "Dear sir,—I sent you a few lines on the 23d instant, by telegraph, advising you of the unfortunate occurrence which happened to the *Oriental* on her getting out to sea, and just at the moment when the pilot was preparing to leave her. She is now in the Atlantic Dock, and the surveyors having ordered her to be discharged, we commenced unloading on Saturday morning, and will have all the cargo out to-night, and will have her on the ways the following day, when another survey will be held on the vessel, and I will then report to you what injury she has sustained; and although she lay all night on the sand bar, the weather being moderate, induces me to think that she is not seriously injured, as the leak has decreased since we began to lighten her. The expenses will be considerable, but fortunately the cargo is valuable, and being on general average, it will not fall so severely as it otherwise might have been the case. It, however, vexes and annoys me very much that such a misfortune should have occurred immediately on the back of the *Kate Kearney*; and Captain

The Oriental.

Hoyt also feels it as well as myself. I shall use all exertion to have her ready for sea again; and if the repairs do not detain us, she may be loaded again by the end of this week."

I am therefore bound to say, that Mr. Miln was clothed with the character of agent, and charged with all the responsibilities, obligations, and disabilities attending upon that character. Assuming this to be so, the main question is this, whether Mr. Wallace had supplied funds or credit to satisfy the demands of this exigency known to Mr. Miln. Throughout these proceedings I do not find it distinctly averred, and certainly not, as I believe, proved by evidence, that Mr. Wallace had ever given express directions and authority to Mr. Miln to draw upon Messrs. Cannon & Co., or upon Mr. Wallace himself, for the necessary expenses of so large an outlay as took place upon the present occasion. I find no general authority for Mr. Miln to draw at all, either upon this or any other occasion. But supposing there had been a general authority to draw, still it must have been competent to Mr. Miln to exercise his own discretion, whether he would advance his own funds upon the personal credit of Mr. Wallace. If Mr. Miln had such authority, what would be the legal objection? I think the utmost extent to which such legal objection could be carried would be, that, if practicable, he ought to have written to Mr. Wallace that he would not advance the money on such security; I say if practicable, because, take an agent in China, with a valuable ship and cargo consigned to his care, if an accident happens to the ship, how is he to give notice to the owners in Europe? It may be said, that although he cannot give notice, yet he is barred from advancing on bottomry. Is that proposition true? Would it be for the interest of the owners in general that it should be established? I greatly doubt it. It would be objectionable in this respect, namely, the narrowing the market, by excluding one probably most willing to undertake the business, and, to a certain extent, bound to consult the interest of the owners, even for his own sake. But I am very reluctant to have it supposed that I would uphold an agent, having authority to draw bills, and having given to his principal reason to believe that he would advance on personal security, in taking a bottomry bond without notice, when such notice could be given so as to avert the bottomry. In the present instance, I am of opinion that the agent had no such regular authority given to him individually. It has, however, been said and sworn, that the master had authority to draw bills, and that he would have done so. I have not sufficient evidence to satisfy my mind that Mr. Miln knew of such authority; and even if he had, he was not bound to have taken such bills in payment.

The case resolves itself into this: Did Mr. Miln give the notice which could be reasonably required? Had the owner or the master the means of obtaining funds on personal credit at New York? If the law required that Mr. Miln should give specific notice that he would require a bottomry bond, assuredly no such notice was given. If Mr. Miln had been in the habit of drawing upon the owner, or upon Cannon & Co., then, I think, he might reasonably have been

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required to give such notice, and for very sound reasons, but the evidence does not establish such a state of facts. What was the notice given, and what the conduct of the parties? The ship returned to New York on the 22d February, and on that day Mr. Miln acquainted the owner by telegraph of the fact. How does the owner protect his property? What instructions does he give? Does he direct him to draw bills for the amount, or make the master do so? Surely it was the duty of Mr. Wallace to answer the communication, and say, "You will do the best you can for the ship." Wallace writes two letters on the 23d of February, one to Mr. Miln, and one to the master, in neither of which are there to be found any instructions as to the manner in which the disbursements should be paid for. In his letter to the master, on the contrary, he speaks of the inconvenience of having to pay 150*l*.¹ I think it would have been surprising if Hoyt, the master, had drawn for 1350*l*., or half that sum, afterwards; and supposing that the letter was shown to Mr. Miln, was it probable that he would have drawn or taken drafts after the perusal of it? Hoyt, in his affidavit, speaks of a 300*l*. draft he had drawn for the cargo of coals, and which had been taken by Mr. Miln in part payment of the disbursements of a former voyage, and this circumstance has been much commented upon, as tending to prove that Mr. Miln ought to have taken his drafts on the present occasion; but I think it does not follow that he would advance, without security, a much larger sum. I do not find that the master proposed to Mr. Miln, or to any one else, to take his drafts on Mr. Wallace, or on Cannon & Co., nor have I the slightest evidence that any one would have taken them. Mr. Miln gave Mr. Wallace ample notice of the disaster which had befallen the ship, but there is no evidence that Mr. Wallace told any one that he would be responsible for the expenses. The real cause of the transaction appears to have been this: The unloading, repairing, and reloading was proceeded with as a matter necessary to be done without delay under the orders of the master, with the superintendence of Mr. Miln. Nothing was said by any one as to payment or advance of money. Mr. Wallace probably expected Mr. Miln would advance the funds; Mr. Miln as probably thought that Mr. Wallace would give directions. In this state of uncertainty, matters went on until the ship was repaired and ready for sea, and then the emergency arose. Ultimately, Mr. Miln declines to advance on personal security, as unquestionably he was justified in refusing to do. Mr. Lawson advised a bottomry bond; advertisements were inserted, three tenders were made, and Mr. Miln's was the lowest.² The vessel had on board a valuable cargo. I think,

¹ This letter, which was annexed to the answer, contained the following passage: "I notice that you wish me to pay Mr. Raymond 150*l*. on your account; it will be rather inconvenient for me to pay it for two or three months; but if he requires it, I shall have to arrange it with him in some way."

² Lawson's affidavit was to the effect, that "deponent's house of business, as average brokers, were applied to in February, 1849, by Captain Hoyt, for aid and advice in the case of the ship Oriental; and that at the time the accounts were made up, he (Hoyt) informed the deponent's said house that he was not able to raise the

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that, had all the expenses belonged to Mr. Wallace, Mr. Miln would probably have advanced, but he did not conceive that there was any reason why he should do so on account of the underwriters. He manifested his good will towards Mr. Wallace, by stating that he was willing to forego the bottomry premium so far as it would fall on the ship.¹ I must therefore pronounce for this as a valid bond; whether the charges included in it are correct or not, is, of course, matter of reference to the registrar and merchants.

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May 9, 14 and 15, 1850.

Salvage — Misconduct — Amount of Compensation to Salvors.

Where salvors are in possession of a vessel, and their services have been accepted, and they can discharge what they have undertaken with safety to the vessel, and with facility, it is not competent to any other persons to interfere with them. But in a doubtful case the salvors will not be justified in refusing further assistance.

Where salvors, not employed at the time, prevented further assistance being given, although their services were afterwards accepted, and they salvaged the ship and cargo, the court awarded them 100*l.*, instead of 300*l.*, and allowed them two thirds only of their costs.

THE schooner *Glory*, on her voyage from Hamburg to London, got upon some part of the Corton and Holme Sands, on the morning of the 19th of March, 1849. Shortly afterwards she was boarded by some of the salvors, whose assistance was refused, but they remained in their boats alongside. At about eight o'clock, Lloyd's agent came and advised the master to employ the salvors in lightening his ship, and in rendering him other assistance; but the master would not adopt this advice. Shortly after this, a steamtug, from Yarmouth, came up, and offered to tow the schooner off, but this offer was not accepted, because, as alleged by the salvors, it was useless, and never made in earnest, the ship being too fast on the sand to be got off without lightening; or, as alleged by the owners, the salvors by violence prevented the steamer from coming close enough. In the course of the afternoon an agreement for a tideswork, in heaving upon an anchor, for 15*l.*, was made with the salvors; but, though they exerted their strength, the ship did not move, and the steamtug again offered her services,

funds to discharge the accounts; that his owner was not able to make, and had not provided, the necessary funds; and that Miln, who had been the agent for the ship on other occasions, had positively declined to make the advances. That deponent's said house advised him to advertise for the amount he wanted on bottomry; that such advertisements were inserted, three tenders made, and thereupon they advised him to accept Miln's, which was the lowest."

¹ In his affidavit, Miln deposed that he would forego so much of the bottomry premium as the owner of the ship would personally be bound to bear according to rate, solely to show his kind feeling, and to serve, in a pecuniary view, the said Thomas Wallace, with whom he had had previous transactions, and not to induce the master to execute the bond.

² 14 Jur. 676. See also 13 Jur. 991.

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but was unable to render them, either through the violent conduct of the salvors, or the position of the vessel herself. Ultimately, the cargo, to the extent of about two thirds, was taken out by the salvors, under the direction of Lloyd's agent, and landed at Lowestoft, where the ship herself was brought on the afternoon of the 20th. The salvors were upwards of one hundred in number. The master of the schooner was alleged to have been drunk during the whole transaction.

Jenner and Deane, for the salvors, argued that the salvors were under the sanction of Lloyd's agent, and, considering the state of incapacity of the master, in possession of the schooner; that the assistance of the steamtug would have been useless on both occasions, until the ship was lightened; that the salvors were justified in resisting the attempts made by the steamtug to take the ship out of their possession; and that no violence or misconduct was proved against them. They cited *The Dantzic Packet*, 3 Hagg. 383; *The Effort*, Id. 167; and *The Queen Mab*, Id. 243.

Harding and Bayford, contra. The doctrine of constructive possession is novel and dangerous, nor can it be supported on principle, for no person, by reason of his coming first to a ship in distress, has a right to prevent others from giving more useful and immediate assistance. In *The Duke of Manchester*, (also, *The Dossitei*,) 10 Jur. 865, the salvors had rendered great service, but, for subsequent misconduct, they were deprived of the whole of their reward, and condemned in the costs. That is a precedent for the present case, in which the property has been injured by a longer exposure to the sea, in consequence of the riotous conduct of the boatmen in keeping the steam tug off.¹

DR. LUSHINGTON. This case has, undoubtedly, occupied a very considerable length of time, much more so, I may say, than generally is the case with ordinary causes of salvage. But still there are peculiar circumstances in the case which, I have no doubt, induced the counsel on both sides to go with great particularity into the evidence, with a view of discharging their duty to their respective clients. As relates to the court, I have long made up my mind, that I best discharge my duty to the public, and to those who are suitors, by listening with patience to all that may be addressed to me by the counsel on the one side and on the other. I never venture to interrupt or stop a counsel, unless it may be on some point where the observation of the court is likely to meet with the immediate acquiescence of the counsel to whom it is addressed.

¹ An objection was taken at the hearing to receiving as evidence a copy of the examination of the master, taken by the receiver at Lowestoft, and forwarded to the receiver general, under 9 & 10 Vict. c. 99, s. 16, on the ground that it was a copy of a copy. To which it was answered, that the examination was taken under the statute and although the word "copies" was used in the section, the parts of the examination were not copies, but duplicates. The objection was not sustained.

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Now, with regard to the case itself, I propose to deal with it in the following manner: First, I shall consider it as a mere case of salvage, and then take into consideration the nature of the service rendered, and what would be the reward which ought to be given to the parties for the performance of such a service. Secondly, I shall consider whether or not the misconduct, which has been attributed to the salvors, is established by the evidence in the cause, and what are those principles of law which ought to guide my judgment in determining the present case. Really, the service itself was of a very simple and plain nature, and I shall state the facts very briefly, for it appears to me, in this case, that it is utterly impossible for the court, by any labor or any time bestowed on the evidence, to deliver itself with precision upon the many issues which are raised. In salvage cases generally, it is a matter of notoriety that often there is not merely diversity of opinion entertained, but also a great conflict of evidence; and it has been the subject of observation by the most learned judge that ever presided in this court, Lord Stowell, one to whose opinion the greatest deference was paid during his lifetime and since, that the mode of administering justice in salvage cases, where the decision must depend very much on the discretion of the judge,—where it is impossible, without incurring expenses which may be overwhelming to all parties, to proceed with great nicety of examination upon each individual point,—must be with something of a rough hand; and all that can possibly be done is, in each individual case, to endeavor to meet the merits, as far as can be done; that the general decision shall give satisfaction on the whole. Now it appears that the vessel was a small one, of about one hundred and eighty-five tons, and her value is admitted to be 2000*l.*; that the ship went on some part of the Corton Sands, about three o'clock on the morning of the 19th March, being on a voyage at that time from Hamburg to London. The salvors, who are suing in the court, came on board, as near as I can make out from the evidence, between four and five in the morning; and I think it is an admitted fact in the cause, that the master refused to allow them to interfere, and certainly did not employ them. Things remained in this state until the arrival of the steamtug from Yarmouth, respecting which I shall remark more particularly when I consider the case of the tug. Whatever was the reason, the steamtug was not employed in endeavoring to get the vessel off the sand; and at about the middle of the day it appears that an agreement was entered into between the master and the salvors, for the sum of 15*l.*, that an anchor should be laid out, to heave upon, and, if practicable, to get the vessel off the sand. Now, there has been a great deal of discussion introduced into the case as to the mode in which the anchor ought to have been laid out; and, no doubt, if you examine the evidence taken *viva voce*, there is a certain degree of contradiction expressed by the persons so examined.

But I think, on the whole, there is not such contradiction with regard to the point, that it ought to induce the court to believe that the measure adopted by the salvors was erroneous. It was, I think, an exceedingly doubtful measure; it was exceedingly doubtful whether

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the vessel ever would have come off, and more than doubtful, by any attempt made to heave her off by means of an anchor and cable; but the event turned out against the chance of the vessel being so released. I cannot say, looking at some of the evidence, which says that it was a proper measure, inasmuch as no one could accurately calculate the height of the ensuing tide, that it was an improper measure to attempt to get her off by bringing her head to the eastward; nor do I think the conduct with regard to getting her off to the westward operates with stringency on this point, because I am inclined strongly to agree with Dr. Deane, that, in truth and in fact, the getting her off to the westward was intended to apply to a time posterior to that when the vessel was lightened. However, the measure so pursued entirely failed, and in the course of the afternoon, under the advice of Mr. Gowing and Mr. Wood, it was determined to attempt to lighten the vessel. The salvors were so employed from five or six o'clock on the 19th March, till between twelve and one in the morning. At that time, it would appear, the weather became more boisterous, and continued so several hours, and consequently augmented the difficulty of the salvors, and rendered their services more valuable, and requiring, in that sense of the word, a large reward. The ship at that time made some water. These measures were pursued till the afternoon of Tuesday, the 20th, when, to use the expression of the salvors, the vessel was kedged off the sand about half past five, and, with the assistance of a steamship, conveyed to Lowestoft. The salvors state — and I presume it to be near the truth — that in that twenty-four hours they had landed about 1000*l.* worth of the cargo. This is a service performed in circumstances of no great danger, but which would entitle the salvors to a full and adequate reward, supposing there was not a set-off, on the ground of misconduct, against them. I think the ship was in very great danger at this time — not in immediate danger, but she was on a sand of a dangerous character, namely, a shifting sand — a sand with suction. It is not denied that the wind was from east-south-east, and likely to drive the ship farther on the sand. This being so, what would have been the merit of the services of the salvors if there were no other circumstances of a different character to be introduced into the case? I now come to consider how far their claims are diminished by any thing that took place. The substantial charge against the salvors is, that they by violence prevented this vessel from accepting the services of the steamtug which came from Yarmouth, and that the steamtug would have been effective in getting her off at the time she arrived in the morning. Whether her services would have been effective or not, they ought to have been accepted, and the experiment made. The defence on the part of the salvors is double: in the first place, a sort of *quasi* denial — not a direct denial — though subsequently, it is said, they did not prevent this tug from having her services accepted; and, secondly, the master was in such a state of intoxication that he was incapable of making exertions or making a bargain. That is used to show that there could be no arrangement between the master and the steamtug; therefore it was merely an offer on the part of the steamtug, and no acceptance on

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the part of the master of the vessel. It is at this period, which I take to be shortly after eight o'clock, that the steamtug came alongside. I can entertain no doubt that her services were offered, and that the master was ready and willing to accept them. I will not say whether the master properly understood the condition of the ship, or was competent to make a bargain. I think he was not; but still I think he was ready to accept the services of the steamer, and that it was by the act of the salvors she was prevented from making an effort. First, to consider that fact independently of any of the consequences arising from it. This brings me to consider the principle of law. Ordinarily, that principle is this: where salvors are in possession of a vessel, and their services have been accepted, and they are adequate to discharge what they have undertaken with safety to the vessel, and with facility, it is not competent for any other set of persons, even one of her majesty's vessels, to come and interfere with the salvors so engaged in such operation. But there is no principle of law that I am aware of, and I think it would be dangerous for the idea to be entertained for a single moment, that in a doubtful case, seeing that the salvors were in possession of the vessel and their services had been accepted, they would be justified in refusing further assistance. I cannot conceive that any notion can be broached more injurious to the security of the mercantile navy of this country, than a notion, that because a man happened first to go on board a vessel, and then a steamtug was offered, he had a right to refuse that assistance, and claim to perform the duty himself, because, by possibility, a set of salvors might heave a vessel by an anchor, or succeed in getting her off the sand. Therefore I should say the salvors had been altogether wrong if they were employed in the first instance by the master; but when I consider that they had not a shadow of claim to interfere, I cannot hesitate to say they were altogether to blame in the conduct pursued towards this vessel in this instance. There appears to be a notion afloat between the people of Lowestoft and Yarmouth, that one set of men have no right to interfere with the other. Several of the affidavits say that it is a custom, from time immemorial, that when once one body of men is in possession of a vessel, they are not to be interfered with by the other. That is a mistaken notion, and never will receive the countenance of this court. I am now speaking of the first refusal of the salvors to allow the steamtug to take the vessel in tow. I do not hesitate to say that they have incurred a great degree of blame. With respect to the consequences of that blame, I apprehend the court has always acted on this principle: if the misconduct of the salvors has been very great, and attended with great loss to the vessel which they ought to have saved, they have either forfeited the whole of the salvage to which they were entitled, or, under different circumstances, a part of it. The case of the *Duke of Manchester*, cited in the course of the argument, was simply a case of this kind, and must have been decided on two points of view. There the salvors had rendered a meritorious service, in going to a vessel on the Goodwin Sands; but, in the opinion of the Trinity masters, they had been guilty of negligence in

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allowing the vessel to get on the Sandwich Flats. The excuse was, that she was in charge of a pilot, and therefore they could not prevent that consequence. I think two things were against the salvors: one was, that, having undertaken to bring the vessel to a place of safety, they did not exercise due care and caution, and show adequate skill; the other was, that great loss arose from their negligence; and hence salvage was refused on both these grounds.

I will now consider what took place on the second occasion of the steamtug coming up. It is satisfactorily proved to my mind, that the conduct of the salvors on that occasion was still more violent than on the first occasion, and they were utterly unjustified in resorting to the means they adopted to prevent the steamtug being employed. Upon the consequence, it is a very difficult matter for the court to form any very decided judgment. Supposing that she had been employed, could she have effected the salvage of this vessel without the unlading any part of her cargo, at the trifling expense of remunerating the owners, master and crew of the tug? This depends on many circumstances, respecting which the evidence, as we often find in these causes, is exceedingly contradictory. I think, if any body were to ask the court to point out, to its own satisfaction, the very place where this vessel lay, I should be utterly incapable of so doing. I have evidence, which ought to be credible on both sides,—that of the harbor master,—who ought to be intimately acquainted with the whole locality. He states that he watched her through a telescope, and the distance was but two miles. He describes the whole locality very differently from other persons produced on the part of the salvors. It is impossible to lay down the point with perfect precision; it is only of importance, however, in this view, whether the vessel might or might not have been got off on the 19th of March. Looking to the whole evidence on that point, I have come to the conclusion that the affirmative is not satisfactorily proved to my mind. I cannot say that I am satisfied by the evidence that there is any approach to moral and reasonable certainty that such would have been the case. The harbor master and Lieut. Joachim, as well as others, swear positively that the vessel could not have been got off, unless she had been lightened. I cannot say, with justice to the salvors, that their misconduct in preventing the use of the steamer necessarily entailed on the owners the loss that happened. Another circumstance operates upon my mind, and that is, the state of intoxication in which the master is proved to have been. I think the evidence goes to show that he was not sober any part of the time. I think the salvors are entitled to the benefit of these facts. If the master was not in a situation to obtain the respect of his own crew, it is not to be expected that he would obtain that of the salvors. I shall, in my final determination, act on this principle. I will state what has passed through my mind. Had there been no misconduct on the part of the salvors, I should have given them 300%. I think their misconduct so gross, that I shall now give them 100%. Had there been no misconduct, they would have been entitled to the whole costs; but I think their misconduct, in respect to the assistance offered by the steamtug, has

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been so gross, and their case on that point supported by evidence so palpably false, that I shall not give them the costs of that part of the transaction. I shall estimate that at one third; and I shall therefore give them 100*l.* and two thirds of their costs.

THE EUROPA.¹

June 11 and 12, 1850.

Collision — Rate of Sailing — Inevitable Accident.

There is no fixed rule as to the rate of sailing, which depends upon the locality and other circumstances; but where a ship is sailing at a rapid rate, her master and crew are bound to exercise greater caution:—

Held, that where a steamship was going at the rate of twelve and a half knots an hour, in a dense fog, and seven hundred miles from land, and the evidence showed that she had only the ordinary lookout, that no arrangements were made for reporting orders to the engineers, and that one man only was at the wheel, her owners could not avail themselves of the plea of inevitable accident in a cause of damage.

THIS was a cause of damage, promoted by the master and owners of the bark Charles Bartlett and her cargo, against the steamer Europa, for having run her down on the 27th June last. The bark, of the burden of 450 tons, laden with iron, lead, &c., and having on board one cabin passenger and 162 steerage passengers, was bound from London to New York; the steamer, of the burden of 1800 tons, with engines of 600 horse power, and carrying the mails, was on her voyage from Halifax to Liverpool. The libel given in on behalf of the Charles Bartlett alleged, that, on the day in question, she was in the track for outward and homeward bound vessels passing to and from America, and at a great concentrating point for both; that in the afternoon there was a dense fog, and the bark was heading north-west by north, close hauled, on the larboard tack, with all requisite sail set, and going four and a half to five knots an hour; that all work was suspended on board in order to keep a good lookout. About half past three o'clock, the wind being west by south, and the sea smooth, in lat. 50° 48' north, and lon. 29° west, in the same parallel of latitude with Cape Clear, and 700 miles distant from it, the master heard a rumbling noise to windward, like distant thunder, and the crew saw the steamer at a distance of 400 yards, steering east-south-east, one point forward of the bark's beam, and going twelve knots an hour. The master of the bark instantly ordered the bell to be rung, and the helm to be put hard a-port. The bark fell off a point and a half, but the steamer, having first starboarded and then ported her helm, without stopping her engines, came stem on into the bark, striking her abreast the main shrouds, in consequence of which she sank in a minute and a half, and 136 of the passengers and crew

¹ 14 Jun. 627.

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were lost. The responsive allegation brought in on behalf of the *Europa* admitted that the accident occurred in the usual track for steamers, but alleged that it was two or three degrees to the north of the usual track for sailing vessels. It denied that there was a concentrating point in the Atlantic, and alleged that the *Europa*, in the then state of the weather, could not be seen by the bark at a greater distance than from 150 to 200 yards, but averred that the noise of the paddle wheels might have been heard in the direction of the bark three or four miles, and that it was owing to some negligence that the bark was not thereby warned of the approach of the steamer. It further alleged, that the bark having been reported by the man on the forecastle at the distance of from 150 to 200 yards, the third mate ordered the helm to be starboarded, but in the same breath, before the order was or could be obeyed, he revoked it, and ordered the helm to be put hard a-port, which was instantly done; that the engines were ordered to be stopped, but the order had been anticipated by the engineers, and they were out of gear. The *Charles Bartlett* was going from five and a half to six knots an hour, having all possible sails set, and had neglected to fire guns, blow her fog horn, or ring her bell at short intervals, so that those on board the steamer should be cognizant of her approach.

Sir J. Dodson, Q. A., and *Twiss* on behalf of the bark, with reference to the improper rate at which the steamer was proceeding, considering the state of the weather, cited the cases of *The Perth*, 3 Haggs. 414; *The Rose*, 2 W. Rob. 1; and *The Iron Duke*, 9 Jur. 476.

Addams and Harding, contra.

DR. LUSHINGTON stated the case to the Trinity masters. You have had an opportunity, of which I know you have availed yourselves, of perusing the very voluminous evidence and documents which have been introduced into this cause, and therefore it will be unnecessary for me to enter minutely into the details of the evidence, but it will be my duty to point out to you the principles of law which govern the decisions of the court, and to obtain your opinion as to the facts of this case, and how far the facts will bring this case within those principles of law which I will endeavor to explain to you. With regard to the evidence, it is a task of very great difficulty to extract from such a mass of extraneous matter, nineteen parts out of twenty of which have no applicability to the questions at issue, and cannot guide us to the decision which we must come to. These cases are now becoming very numerous, and it is to the interest of the mercantile world, and the owners of ships, that they should be decided promptly, and with as little expense as possible; but, if the precedent unfortunately set on the present occasion should be followed in future, the proceedings in this court, instead of tending to the due administration of justice, would be a disgrace to it. Something has been said, in this case, as to what is called, technically speaking, the *onus probandi*; in other words, on whom the burden of proof ought to lie. Certainly,

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where a person, plaintiff in a cause, charges another with having committed an act whereby injury has been done, it is necessary for him to produce all the proof reasonably within his power to establish that charge. Having done that, it rests with the other party to show that he has not been guilty of the acts attributed to him ; but it is a maxim of law as well as of common sense, that no man is compelled to do that which it is impossible for him to effect. It would be absurd to suppose that the owner of the ship run into could establish, by evidence of his own producing, what was actually done on board the ship doing the damage, for that must depend on the crew on board that vessel, to which he cannot, generally speaking, resort. With regard to so much of the dispute respecting the distance at which the two vessels were seen from each other, and the time which elapsed before the collision, in all cases of this description, almost without exception, nothing is more difficult than to find consistent evidence. There is always a great discrepancy on these points, and more especially in a case like this, because the collision was attended with most unfortunate and calamitous consequences, which must have distracted the most strong-minded of men on board both vessels. The defence offered, at the conclusion of the allegation given in on the part of the *Europa*, is, in substance, to the following effect, that the collision in question was either the result of inevitable accident, or the fault of those on board the *Charles Bartlett*. What is an inevitable accident? Inevitable accident, in the absolute and strict sense of the term, very seldom takes place. "Inevitable" must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case. In the strict sense of the term there are very few cases of collision that can be said to be inevitable, for it is almost always possible, the bare possibility considered, to avoid such an occurrence. It was possible in this case, by going at a slower pace, or lying to during the fog. But the import of the words "inevitable accident," in my view, is this: where a man is pursuing his lawful avocation in a lawful manner, and something occurs which no ordinary skill or caution could prevent, and, as the consequence of that occurrence, an accident takes place. Now, it is very easy to define what is a lawful avocation ; but it is not so easy to say what is a lawful manner.

The test, whether it is lawful or not, is this, the probability of injury to others ; and that, of course, depends upon circumstances. It is quite manifest, that injury or mischief to others, whether it be to life, limb, or property, would be probable or not, not simply according to the act done, for instance, the sailing at the rate of twelve and a half knots an hour, but according to the time at which it was done, and the locality where the occurrence took place. I apprehend this distinction is founded upon one universal general principle, equally applicable to sea as to land. I cannot entertain a doubt that there might be case of such careless and reckless navigation, that, if death ensued, the parties guilty thereof might be convicted of manslaughter. For instance, if a steamer went from twelve to fourteen knots an hour through anchorage ground, where from two hundred to three

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hundred vessels were lying, and life was lost, it would be manslaughter. On the other hand, it is equally clear that the most fearful collision might take place at sea, and no culpability attach, however lamentable the loss of life and property. Therefore I agree with an observation made at the bar, that much as we may regret the loss which occurred, yet that is a consideration upon which alone we ought not to condemn the steamer. Whether she be to blame or not, she might have occasioned the same loss of life by some accident beyond all possibility of control, while pursuing a lawful avocation in the most lawful manner. The *Iron Duke* and other cases decided in this court were cited in the argument. The *Iron Duke* was on a voyage from Dublin to Liverpool, and in a locality where she was likely to meet a great number of vessels; but that case and the others are only applicable to this case so far as laying down the principle that no man may navigate a vessel with probable risk to the lives of others. The great principle is the chance of injury to life. In 1 Russ. Cr. 657, under the title of "Excusable Homicide by Misadventure," is a passage which applies directly to this case, and that passage is in these words: "Homicide by misadventure is where one, doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person." I have but to alter the words; inevitable accident is where one vessel, doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel. I have but to furnish these words, and the principle applies here. Again, it is stated in the same passage, "The act must also be done in a proper manner, and with due caution, to prevent danger." That applies as much to the destruction of property as it does to the destruction of life.

There is another distinction taken, which is applicable to this case: "But it should be observed, that the caution which the law requires is not the utmost caution that can be used." The law is not so extravagant as to require that a man should possess that mind, and understanding, and firmness of purpose, as always to do what is right to the very letter. If it were so, it is obvious that the demands of the law would be seldom satisfied. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases, such as has been found, by long experience, in the ordinary course of things, to answer the end, the end being the safety of life and property. And it is not unimportant that I should point out to you a distinction which has been taken, and which is applicable to this case. A question of this kind arose about one hundred and sixty years ago. I take the words from the same passage in this book, Russ. Cr.: "A. was driving a cart with four horses in the highway, at Whitechapel, he being in the cart, and the horses, being upon a trot, threw down a woman who was going the same way, with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Bury, B., and the Recorder Lovell, held this to be only misadventure," that is, inevitable accident, "but by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter." This was

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one hundred and sixty years ago, when Whitechapel was not a street where people usually pass, but open fields. It is taken from Lord Holt, and is applicable to this case; it is applicable either in this sense of the word, suppose the collision had been in broad daylight, in the broad Atlantic; or it would be applicable supposing it had been in a locality where there would have been a likelihood of meeting vessels, as there would have been of meeting people in a crowded street; then it is an illegal act. This will bring us to the consideration whether there is any distinction between the broad Atlantic and the peculiar locality in which this unfortunate collision took place. I think we cannot mistake the object of our inquiry, which is this, whether the *Europa* going about twelve and a half knots an hour, in so dense a fog that she could not see beyond one hundred and fifty or two hundred yards, and in lat. 50° 48' north, lon. 29° west, there was more than ordinary probability of meeting vessels. If there was a reasonable probability of a collision taking place, then, beyond all doubt, the *Europa* will be to blame. Let us consider a little how the case stands. The speed and the density of the fog are admitted; but as to the chance of meeting vessels in this peculiar locality, the parties are at utter variance, and the evidence is very contradictory. I do not think, if I were sitting alone, without the aid and assistance of you, gentlemen, that I could come myself to any very satisfactory conclusion as to the result of the evidence upon the frequency of vessels meeting in this locality. I use the term "locality." I think an unfortunate expression was used in the libel, calling it a "concentrating point;" but I think it is manifest to all of us what was meant and intended by the term "concentrating point;" the meaning is, that vessels going to and from Great Britain, Ireland, and various parts of the United States of America, cross at a certain line drawn on the chart. It is probable the place of meeting would be somewhere in that locality. That is the nature of what is intended to be proved, and attempted to be proved, by the evidence.

Now, the result of the evidence, so far as I am able to draw any satisfactory conclusion from it, and that not without much doubt, is, that there are certain vessels likely to pass in that track; it is not a place in which vessels going to America or coming to Great Britain always necessarily pass through, but there are certain vessels which always pass that track. It is not satisfactory evidence to my mind of the probability of danger, to be told, that if a ship is going from one part to another, she must go in a certain track, but it must depend also on the number of vessels at the time and season of the year being found together. I could not say there was more than ordinary danger of a collision taking place there, unless I was satisfied there was more than an ordinary probability of a congregation of vessels being found in that locality at the time. Now, you will be able to correct this evidence, and by your knowledge of the course adopted by vessels, you will be able to come to a conclusion as to whether or not there was a greater probability of meeting vessels in that peculiar locality than elsewhere, and whether that probability amounted in any degree to danger, from the number of vessels likely

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to be there at or about the time. That will embrace one head for your consideration.

The next question will be, whether, assuming it to be true that the Europa, and other steam vessels of that class and character, might safely navigate to and from the United States to Liverpool, or any part in this country, through the track in question, and at the rate the Europa was going, in so dense a fog, she adopted the necessary precaution for the purpose of performing that duty safely. I have already pointed out that "reasonable" precaution is sufficient. One of the most important questions is, whether there was or was not a sufficient lookout. That depends on two things: first, upon what you in your judgment would deem to be a sufficient lookout; and, secondly, upon a matter of fact, what was the actual lookout. I have no hesitation in saying, that, under the circumstances, the case requires, as a reasonable lookout, the most ample that could be adopted. It is obvious that it is upon the discipline of the ship that safety in avoiding collision must entirely depend. It must depend, first, upon the efficiency of the lookout; and, secondly, upon the speed and expedition with which every order is executed. According to my understanding of the evidence, it stands thus: that in dense fogs, and in cases of difficulty, the lookout on board the Europa was generally this: first, an officer on the foremost bridge; second, his junior at the con; third, a quartermaster at the wheel; fourth, a second hand in the wheel house if the fog was very dense; fifth and sixth, two lookouts on the top-gallant forecastle; then, what seems somewhat doubtful, therefore I cannot rely much upon it, a man at the lee side of the bridge, and also a man at the crank, to convey orders to the engine room. Now, the actual watch on the present occasion, so far as I can make out, was the following: Wardell, the second officer of the watch, on the bridge; Coates, a quartermaster on the top-gallant forecastle; White at the wheel; and Fern, another quartermaster, at the con; and I do not find any other person whatsoever employed on the lookout. Captain Lott, the master of the Europa, is asked a question; and he states, in answer to the seventh interrogatory, "One hand only is usually placed at the wheel of the Europa at sea, in clear moderate weather, with a fair wind, and the engines going at full speed, and all sails set; for she steers as easily as a boat at such times. We sometimes have three hands at the wheel in an adverse gale of wind in very bad weather, and two when it is not quite so bad; for we have two wheels; one of them can be attached to, and used with, the other in bad weather and an adverse gale, but with a favorable gale we only use one of them. One man only is generally at the wheel on entering Halifax, Liverpool, Boston, or any other harbor, but the other quartermaster in the watch is usually at hand to assist at the wheel if required. When the second quartermaster is required, it is usually to heave the helm quickly over, where it is desirable that the movements of the wheel should be as quick as possible." The meaning of this evidence, as I understand, is, that where it is necessary or expedient that the helm should be moved with great rapidity, a second person is stationed at the

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wheel to assist the one in charge of it to move it with greater celerity. Whether or not, under the circumstances of the case, one man was sufficient, and whether or not this was a case in which great celerity might be required, are matters for your judgment as practical men. It is stated in the course of the evidence, that one man was sufficient to put the wheel to port, but would not be sufficient to put it to starboard. [The learned judge then referred to the evidence given as to the lookout that was kept, and went on to say:] There is another point in the case, which is equally necessary to bring to your attention; that is, was there or was there not a sufficient arrangement as to the engines? The safety of the Europa herself, and of vessels which are likely to meet her, mainly depends on the expedition with which the orders are executed, and the means which are adopted to execute them with great expedition. As a landsman, I may say, that if it is necessary to stop a vessel, the arrangements should be the best to effect it in the shortest time. I have thought over the evidence very much, and am now unable to tell you how the engines came to be stopped. I do not mean to say that there is no evidence to show that certain things were done, but whether they were done in pursuance of orders or not, is left in great darkness, and I cannot make out whether there was any body in charge of the engines or not. You will have to consider whether there ought to have been any person placed in order to report the orders which might be given on deck, and transmit them to the engine room. It does not appear that any person was so stationed on the present occasion. You will also have to determine whether there ought to have been a second person placed at the wheel. Lastly, whether the order to starboard the helm, which is admitted on all hands to have been erroneous, did or did not produce any effect whatever in this case. Looking at the rapidity with which the two vessels were approaching each other, it is a fact of no small importance.

I will now direct your attention to the case of the Charles Bartlett. We must inquire and determine whether she was in any respect to blame in this collision. Was she carrying too much sail? Was there a want of sufficient lookout? And above all, are you of opinion that she ought to have sounded a fog horn, or rung a bell? Whether she could have heard the paddle wheels of the steamer must depend upon many circumstances. If those on board her ought to have heard them before they did, and did not do so, or neglected to take the right precautions, undoubtedly they were to blame, and must sustain the consequences. You must also consider whether, if they had heard them, they could have done any thing to have obviated the collision. Would the blowing of a fog horn have been of any use, considering what is stated by those on board the Europa, namely, that her paddle wheels made so much noise that it was almost impossible to have heard any thing except a loud noise? One of the witnesses states that he doubts whether, unless they had fired a gun, a signal could have been heard.

After some consultation with the Trinity masters,—

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DR. LUSHINGTON said: In conjunction with the gentlemen by whom I am assisted, we have considered all points in this case which I have suggested as necessary to be determined, and I trust that there has been no omission as to any one of them. We have come unanimously to the following determination: That no rate of sailing by steamers or other vessels can be said absolutely to be dangerous, but whether any given rate is dangerous or not must depend upon the circumstances of each individual case, as the state of the weather, locality, and other similar facts. That the rate of twelve and a half knots an hour, in a dense fog, in the locality where this occurrence took place, must be attended with more risk than a slower pace; but assuming that it might be accomplished with reasonable security, and without probable risk to other vessels, such a rate of going could not be maintained with such security, except by taking every possible precaution against collision. That proper precaution was not taken by the *Europa*; first, she had not a sufficient lookout; secondly, we think that no proper arrangements were made as to the engines; thirdly, no person was placed to report to the engineers the orders; fourthly, no second person was placed in the wheel house; fifthly, that the order to starboard the helm was erroneous. We are of opinion, that, if proper precaution had been adopted, the accident might have been avoided, and that the collision took place for want of the proper precautions. With respect to the *Charles Bartlett*, we are of opinion that a good lookout was kept on board; that she discovered the approach of the *Europa* as soon as circumstances would permit; that she adopted all proper measures to avoid the collision, by ringing the bell and putting her helm to port. Therefore, I must pronounce against the *Europa* in this case.

THE HENRY.¹

January 31, 1851.

Salvage — Agreement — Tender.

Where the master of a ship in distress agreed with the salvors to pay them a certain sum for their services, the agreement will be upheld as against the salvors, unless fraud be proved against the master.

The value of the property salvaged is not the only consideration upon which the agreement should be made or depend.

THIS was a suit promoted against the *Henry*, to obtain salvage remuneration for services rendered to her on the 8th October last. The salvors, bound to the Doggerbank on the cod fishery, when off Hasborough Sand, the wind blowing west and by north, with a heavy sea running close to the sand, descried the *Henry*, as they represented, in

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a dangerous situation on the edge of the sand. The crew of the sloop hailed, and five of the salvors proceeded to her in a boat; four of them boarded the vessel, which was lying at anchor in broken water, the sea making a clean breach over her. The vessel had sustained so much damage, that it was impossible for her to escape without assistance. The salvors, having inquired of the master the value of his cargo, to which he replied that it consisted of fuller's earth, entered into an agreement with him for 100*l*., and conducted the vessel to Yarmouth. On arriving there, the salvors, having ascertained that, besides the fuller's earth, there was a cargo worth 2000*l*. on board, refused the 100*l*. which was tendered them, and instituted the present suit. These averments, except the agreement and the tender, were in great part denied by the owners.

Sir J. Dodson, Q. A., and Jenner, for the salvors.

Addams and Blake, contra.

DR. LUSHINGTON. It was correctly stated by Dr. Jenner, in opening his argument, that there were two points which might arise for the decision of the court on this occasion. First, whether the court was bound to pronounce for the tender which had been made, that tender being in fulfilment of an agreement alleged to have been executed between the parties. Of course, if it be determined that that agreement was a subsisting and valid one, the court would have no task left to discharge, save that of pronouncing for the tender. On the other hand, and secondly, if the agreement be bad *ab initio*, in consequence of circumstances alleged in the proceedings, I should have then to consider the whole merits of the case, and determine what sum I should give as a reward for the services which are admitted to have been rendered to the ship and cargo. The vessel was employed in the coasting trade, proceeding to the port of London from Goole, being of the burden of 67 tons. She had 75 tons of fuller's earth on board, of very inconsiderable value, but the remainder of the cargo was estimated at about 2000*l*. Whilst in the prosecution of this voyage she met with bad weather, and certain damage was done to her. She anchored on the edge of the Hasborough Sand, and whilst lying there—whether in imminent danger or not, I say not at present—the *Caledonia*, a fishing vessel, manned with nine hands, going to the Doggerbank, came to her assistance. That assistance was accepted, and that an agreement was made between the parties is not disputed on either side. Whether it is null and void from the concealment of important facts is another question. Where agreements are made at sea between salvors and the masters of vessels, the court will always be very desirous to confirm them, if it can do so consistently with equity and justice. The court would be very reluctant, under ordinary circumstances, to disturb an agreement made between parties on account of the sum appearing too large or too small; but I do not say that there are not cases in which I should not hesitate for a single moment to pronounce against an agreement either on the

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one ground or the other. There are many reasons for this. It is obvious that both parties are fully capable of entering into a contract; the master is the representative of the owners, and the salvors are acting on their own behalf, and have ample means of so doing, because, being on the spot at the moment, they must be cognizant of the state and condition of the vessel which requires assistance, the nature and extent of the services to be performed, and the time to be occupied in rendering them. It is very desirable that agreements of this kind should exist, and that, when just and fair, they should be upheld in these courts. If, however, fraud has been contracted by the parties, it was not and cannot be disputed that the court ought to set the agreement aside; the *onus probandi*, however, must rest upon those who impute the fraud. On the present occasion, the fraud imputed is in the following words: It is alleged on the part of the salvors, "that the master inquired whether they could take his vessel clear off the sand, to which they replied in the affirmative; that the said master then endeavored to make an agreement for a certain sum to be paid for their services, which they at first declined." I should here observe, that they had a perfect right to decline any agreement, and to say that they would leave it for the court to decide. Though the court would set aside an extortionate agreement, yet it would never say that salvors were to blame for not making an agreement at all. "That upon the master expressing his determination to have an agreement, the master of the smack asked him of what his cargo consisted, to which he replied that it was of no value, as it was nearly all fuller's earth, or to that effect; whereupon the salvors, well knowing the small value of a cargo of fuller's earth, consulted together, and agreed to take the sloop in tow for 100*l*., and the master of the smack expressly informed the master of the sloop that they made such agreement by reason of the small value of the cargo."

Now, upon this passage a great deal depends, and very much occurs to the court. First, as to the fact, whether it be true that the transaction assumed the shape alleged in this act on petition; secondly, if it does, whether it necessarily amounts to fraud; thirdly and lastly — and not of the least importance in this and all other cases — whether the court can sanction an agreement of this description, or set aside an agreement upon the ground that the salvors did not know the value of the property. It is distinctly denied on the part of the owners that any such conversation took place antecedent to the making of the agreement. With respect to the primary evidence, it stands thus: It is sworn by the salvors that the conversation took place; it is distinctly denied by the master and the people on board the ship that it occurred. If the case stood there, the court would have no difficulty in coming to the conclusion that the averment was not proved. The secondary evidence is, that the master acknowledged that he had committed an act of deception; and to establish this, two affidavits are produced on behalf of the salvors, which are rebutted by the agent of the owner and the master himself. I do not know that, under the circumstances, I am called upon to pronounce any decision on the fact. I am clearly of opinion, whatever may be

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the nature of the alleged fraud, that it is not proved by the evidence produced in this case. It is possible that a conversation somewhat to the same effect might have taken place, and yet that no fraud was intended on the part of the master, because the great majority of the cargo unquestionably consisted of fuller's earth, and he may not have known the value of the rest of the cargo. If the master had been asked to state the condition of the ship, and had given a false description of the damage done and the difficulties under which she labored — if he had concealed the leaks which might possibly have existed in the ship, or had misrepresented the number of his anchors and cables, or the means of supplying any want, that would be a clear fraud affecting the agreement itself, upon which the court would have been inclined to hold that it was null and void from the beginning. I cannot assent to the proposition, that by the value of the cargo the salvors are to determine the amount of the agreement. It is perfectly true that this court does, to a certain and limited extent, take into consideration the value of the property saved in assessing salvage compensation, with the view of making the general rate of compensation sufficient to induce persons to undertake salvage services, and, as it were, to a certain extent, making up, in cases of large value, for the impossibility of giving a complete and adequate reward in cases of small value. Salvors are not entitled to make an agreement upon any other grounds than these: The extent of danger to which the property to be salvaged is exposed, the degree of labor they will have to undergo, the risk to which they themselves may be exposed, and the length of time to be occupied; but they are not to speculate on the value of the cargo. See what a dangerous principle I should encourage if I allowed this to pass without observation. Here is a packet coming from South America laden with dollars; she gets, in great distress, into the chops of the channel; assistance is offered, but the salvors say, "We will do nothing till we know the quantity of dollars on board." That would, in the first place, lead to extortion; and in the second, to disputed agreements over and over again, because the master may be ignorant of the precise value of the property. It is my duty utterly to discourage such proceedings as this. I am of opinion that the agreement is valid and binding, that the tender has been duly made, and I pronounce for it, and with costs. I hope no case of a similar description will come under my attention, for if it does, it will inevitably be followed by a similar sentence.

Derelict Iron.

DERELICT IRON.¹

March 3, 1851.

9 & 10 Vict. c. 99 — *Receiver of Admiralty Droits — Jurisdiction of the Court of Admiralty.*

JENNER, on behalf of several fishermen, applied for a monition against a receiver of admiralty droits, to bring into and leave in the registry of the court the proceeds of the sale of certain iron salvaged and delivered to him, under the 5th section of the Wreck and Salvage Act, 9 & 10 Vict. c. 99,² and, as alleged, improperly sold by him at public auction, within the time prescribed by the 9th section, for the sum of 153*l*.

[*Dr. Lushington.* What jurisdiction have I over the matter? The property comes, in course of law, into the hands of the receiver, and if he has dealt illegally with it, can I interfere and set him right?]

The court may treat him as a stranger; he had no authority to sell the iron, which was neither perishable or of small value, under sect. 11, and he ought to have kept it for the time prescribed under sect. 9, when the salvors would have received reasonable compensation if the owners had made out their claim, or from the lord of the manor under sect. 10. The jurisdiction of the court is saved by sect. 40 in all salvage cases, except where goods salvaged are directed to be sold under the statute, which is not the present case. The court may, therefore, decree salvage out of the proceeds.

DR. LUSHINGTON. I know of no remedy I can give you. You can go to the treasury.

¹ 15 Jur. 300.

² 9 & 10 Vict. c. 99, s. 9, enacts, "That if the rightful owner of any article, which has been so reported to or seized by any receiver as hereinbefore directed, shall make out his claim to the said article, to the satisfaction of the said receiver, within the period of twelve calendar months from the day on which such article shall have been so reported to or seized by the said receiver, such article shall be restored to the said owner, on payment of the duties and necessary charges attending the care or removal of the same, and a reasonable compensation for salvage thereof, and also on payment to the said receiver of a sum after the rate of 5*l*. per cent. on the value of the article, but in no case, whatever may be the value of the articles, shall such percentage exceed 50*l*."

Sect. 10. "That when any such article as aforesaid shall have been in the custody of any receiver in manner aforesaid, and shall not be legally claimed by the owner thereof within the aforesaid space of twelve calendar months, and any lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, having given due notice of his or her claim as hereinbefore required, or his, her, or their bailiff, reeve, or other officer, shall, within the space of thirty days after the expiration of the said term of twelve calendar months, make it appear to the said receiver, by the production of satisfactory evidence, that such article was found within the manor or district in respect of which such claim is made, it shall be lawful for the receiver, and he is hereby required and enjoined, to deliver up such article to the said lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, or his, her, or their bailiff, reeve, or other officer, on payment of the duties, and all charges and expenses attending the care or removal of the said article, together with

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a reasonable compensation for salvage, and also on payment to the said receiver of a sum after the rate of 5*l*. per cent. on the value of the article, but in no case, whatever may be the value of the articles, shall such percentage exceed the sum of 50*l*.: provided always, that if the receiver shall determine against the right of any person claiming to be the owner of any such article as aforesaid, or against the evidence produced by any lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, as to the finding of any such article as aforesaid, he shall be bound, at the request of the party against whom he shall have determined respectively, to signify such determination in writing, with the date thereof and the reasons for the same."

Sect. 11. "That when no claim to any article in the custody of any receiver or officer of customs as aforesaid shall be established, either by the owner thereof, or by any lord or lady of a manor, or patentee or grantee of the crown, or other such person or body corporate as aforesaid, within the said respective periods as aforesaid, then the said article shall be deemed and taken to be droits of admiralty, and shall be sold by the said receiver without any legal process whatsoever, and the net proceeds thereof, after the payment of salvage, when the same shall be payable, and of the other charges, shall be forthwith transmitted by him to the said receiver general: provided always, that when any article in the custody of any receiver or officer of customs as aforesaid shall be of so perishable a nature, or so much injured or damaged, that the same cannot, in his opinion, be kept, or if the value thereof shall not be sufficient to defray the charge of warehousing, then and in every such case it shall be lawful for the said receiver to sell the same before the expiration of the periods hereinbefore mentioned, and the money raised by such sale, after defraying the salvage and other expenses thereof, shall be transmitted by him to the said receiver general, and remain in the hands of the said receiver general, to abide and be subject and liable to the claims of all persons, in like manner as the article itself would remain and be subject and liable to if remaining unsold: provided, also, that it shall be lawful for any receiver, and he is hereby authorized, if he in his discretion think fit, when he shall have in his custody any article which shall not appear to him to be of greater value than 5*l*., to sell the same before the expiration of the said periods, and forthwith pay salvage to the party claiming the same, and to transmit the remainder of the proceeds of such sale in the manner hereinbefore provided; but in every such last-mentioned case the salvor shall not be entitled to more than one third of the net produce of such sale."

Sect. 40. "That the High Court of Admiralty shall have jurisdiction to decide, in manner hereinbefore mentioned, upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods hereinbefore directed to be sold as droits of admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such services shall have been performed upon the high seas or within the body of any county, any thing in any act contained to the contrary notwithstanding."

CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

DOCTORS' COMMONS;

DURING THE YEARS 1850 AND 1851.

Court of Arches.

. CONNELLY v. CONNELLY.¹

May 9 and November 13, 1849, and March 23, 1850.

P. C. and C. A. C., subjects of the United States of America, and members of the Protestant Episcopal church in the United States, were there married, according to the rites and ceremonies of that church. At the time of the marriage, P. C. was a priest in holy orders of the same church. Some years afterwards, P. C. and C. A. C. being in Rome, P. C., desiring to take orders in the Roman Catholic church, presented a petition to that effect, and in compliance with the rescript to that petition, C. A. C. took the vow of chastity, and the petition was granted; the rescript authorizing P. C. and C. A. C. to live separate, and being pleaded to be tantamount to a sentence of separation. The petition and rescript were annexed to the allegation as exhibits. After this, P. C. and C. A. C. came to England, where the latter became superioress in a convent, and the former a chaplain to a Roman Catholic peer. In a suit for restitution of conjugal rights, promoted by P. C.:—

Held, first, that the rescript merely authorized P. C. and his wife to live separate, and did not amount to a sentence of separation.

Secondly, that the *status* of parties, domiciled subjects of, and married in, America, was not so affected by a sentence pronounced at, and founded on a rule of law peculiar to Rome, the persons being then resident at Rome, and coming subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the married state of such persons.

THIS was a suit for restitution of conjugal rights, brought by the husband against the wife. In answer to the libel, an allegation was brought in on behalf of the wife, and the admission of that allegation was opposed, when the court, without hearing the counsel for the husband, directed the allegation to be reformed, by pleading in a more formal manner the several documents relied upon by the wife in proof of a separation decreed or sanctioned between her husband and herself by the authorities at Rome. The allegation, having been

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so reformed, was brought in, and its admission again opposed. The contents of the libel and allegation are fully stated in the judgment.

Bayford and *R. Phillimore*, for the husband. If all the circumstances pleaded were fully proved, they would offer no defence to the husband's prayer, the law of this country holding that married persons are bound to live together, unless one of them be guilty of adultery or cruelty. The petition and rescript relied on, as constituting a sentence of separation, is, when examined, a mere petition that Mr. Connelly might be ordained without letters dimissory from his own diocesan or bishop; and three grounds are set out upon which it is supposed the court may reject the husband's prayer: first, that Mr. Connelly is a priest in orders of the Roman Catholic church; secondly, the vows and the position of Mrs. Connelly as superioress in a convent; and, thirdly, the vows and consent of both to live in chastity. History shows that these are regulations peculiar and confined to the Roman Catholic dominions. Moreover, foreign profession is not recognized in this country; *Co. Litt.* 131, a; and this country takes no notice of such vows. *Rex v. Portington*, 1 Salk. 162. [They also referred to *West v. Shuttleworth*, 2 My. & K. 684.] But supposing the petition and rescript to amount to a sentence of separation, and remembering that an English forum is trying the effect of a Roman sentence upon the *status* of American subjects, all the authorities show, that the court cannot give effect to such a sentence. *Don v. Lippmann*, 5 Cl. & Fin. 13. *Lindo v. Belisario*, 1 Consis. 216. *Warrender v. Warrender*, 2 Cl. & Fin. 488. *Sinclair v. Sinclair*, 1 Consis. 294. Story's Conf. Laws, 865. The solitary case in which this court has held its hand, and refused to send a wife back to her husband, is that of *Molony v. Molony*, 2 Add. 249; and that case seems to have stopped from some other cause than the opinion of the judge, whether judicially expressed or not.

Addams and *Robertson*, for the wife. We do not plead the sentence, except as a circumstance showing, when taken in connection with all the other parts of this case, the extreme hardship which the court will inflict upon this lady if she is compelled to return to a cohabitation with her husband, from whom she separated reluctantly, and with whom her vows, taken by the persuasion of her husband, forbid her to live.

March 23, 1850. SIR H. JENNER FUST. This suit is promoted by the Rev. Pierce Connelly against his wife, Mrs. Cornelia Augusta Connelly, who is described in the citation as living separate and apart from the domicil of her husband, at Hastings, and it is brought before this court by letters of request from the vicar general and official principal of the diocese of Chichester. The citation being served, an appearance was given for Mrs. Connelly, and a libel was brought in, consisting of several articles, pleading, "that the marriage that was had between the parties took place on the 1st December, 1831, and that it had been celebrated in Philadelphia, in the United States of

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America, and according to the rites and ceremonies of the Protestant Episcopal church in the said United States, the same" — as pleaded in the libel — "being identical with the rites and ceremonies of the church of England, as by law established in this country;" and the marriage was solemnized "by the right reverend father in God, William White, doctor in divinity, bishop of the Protestant Episcopal church in the diocese of Pennsylvania, in the said United States, and in holy orders of the church of England, and duly consecrated by the archbishop of Canterbury for the time being." The libel went on to plead the consummation of the marriage, and the birth of five children, three of whom are pleaded to be now living; the cohabitation of the parties till October, 1847, when, as alleged, Mrs. Connelly left her husband, and has ever since continued to live separate and apart from him,* though repeatedly requested to return. It concludes with the usual prayer, that she may be compelled to return to her husband. This libel was admitted without opposition; the marriage was confessed as pleaded; and, in an answer to it, an allegation was asserted on behalf of Mrs. Connelly, which constituted, in point of fact, her defence to the suit. The allegation, as reformed, pleads the marriage, to the same effect as it was pleaded in the libel — not precisely in the same terms, but to the same effect. It afterwards goes on to plead the circumstances under which the cohabitation of these parties took place; that Mr. Connelly, at the time of the marriage, was a priest in holy orders of the Protestant Episcopal church of the United States in America, with cure of souls in Pennsylvania; that immediately after his marriage he was appointed rector of the church at Natchez, in the State of Mississippi, where the parties went to reside, and continued to be resident till the month of October, in the year 1835; that they agreed to embrace the Roman Catholic religion, and accordingly took the necessary steps for their admission into that church, with the further view of Mr. Connelly's ordination as a minister of the church of Rome; and, preparatory to that step, Mr. Connelly agreed that they should consent to live in perfect chastity. Accordingly Mrs. Connelly was placed in a convent at Grand Coteau, in the State of Louisiana, Mr. Connelly in the mean time going to Rome to make the arrangements for his admission to the Roman Catholic church. In July, 1843, Mr. Connelly returned to Philadelphia, where he was rejoined by his wife, and they proceeded to Rome, where they arrived in December that year, and where they continued to live together till 1844, living in the same house, but observing perfect chastity towards each other. Their object, it goes on to plead, in going to Rome, was to obtain a formal decree, tantamount to, or in effect being, a sentence of separation. A petition was then presented, stating the circumstances which have been already alluded to; that was referred to the cardinal vicar general, who, as was pleaded, pronounced in effect a sentence of separation.

So, here, it is not pleaded that it was an actual sentence of separation, but that he pronounced a sentence, which was, in effect, a sentence of separation; and on the 8th April, 1844, Mrs. Connelly was placed in the convent of "The Sacred Heart," and on the follow-

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ing day Mr. Connelly entered himself in the Collegio de Nobili, and on the next day received the first clerical tonsure, and assumed the ecclesiastical dress. And in support of this allegation there are two exhibits, which are annexed, the petition which is presented, and that which is said to be, in effect, the sentence of separation. Mr. Connelly received sub-deacon's orders on the 29th June, 1845, and on the 16th July following was ordained a priest. In May, 1846, Mr. Connelly came to England, and became chaplain to the Earl of Shrewsbury. Mrs. Connelly also came to England, and in the month of October following founded a community of religious women at Derby, which has been since removed to Hastings, of which community she is the head or superioress, having brought with her from Rome certain rules for the government of the community, which were approved of by competent ecclesiastical authority. It became necessary, as is pleaded, for Mrs. Connelly to take the vows of poverty and obedience, in order to qualify her for the office she was to hold as superioress, and accordingly, on the 21st December, 1847, these vows were taken, — the vows of poverty and obedience, — and the other vow of perpetual chastity was repeated. The allegation proceeds to plead that Mr. Connelly, at first, consented to her taking these oaths on entering into this society, but he afterwards dissented, on the ground that he was responsible for any debts which his wife might contract. He drew up a protest to that effect, which was afterwards withdrawn. The vows were taken, and an exhibit is annexed to the allegation, which is a letter from Mr. Connelly, stating the grounds of his protest against the vows being taken by Mrs. Connelly. In the month of January, 1848, Mr. Connelly went to Hastings, where he demanded an interview with his wife, who declined to see him. It then pleads, that a decree, to which the court has already adverted, was extracted and personally served on Mrs. Connelly, on which these proceedings are founded. I do not think it necessary to go into minute details, but I believe I have stated correctly the effect of that allegation; there were the steps preparatory to Mr. Connelly being admitted to holy orders in the church of Rome, — there was the vow of perpetual chastity, the vows of perpetual poverty and obedience, the entrance into a religious community, by both parties, — and further, the establishment of a religious community in this country. The law is pleaded in the twenty-first article of the allegation, in the following terms: "That the following are rules of the Roman Catholic church, applicable to the question at issue between the parties in this cause, derived from, and regulated by, its written laws or canons in that behalf, and of which the principal are to be found in the Decretals, lib. 3, tit. 32, '*De Conversione Conjugatorum*,' to wit." Then follow these rules: 1. "That a husband and wife, *post matrimonium consummatum*, may lawfully separate by mutual consent, in order that they may enter into religion severally, to wit, by the husband taking holy orders, and the wife making a vow of perpetual chastity, and entering a religious house, or there being professed and taking the veil." 2. "That a separation, founded on such mutual consent, and for such purpose as aforesaid, after such orders have been taken and such vow or profession made, though not annulling such *matrimonium consum-*

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matum, debars the parties in *perpetuum ab omni usu ejusdem*, and from that time forth *alter alteram repelere non potest.*" 3. "That a separation of husband and wife by mutual consent, for such views and objects as aforesaid, must be approved of and allowed of by the pope; upon the petition of the parties, and his rescript of such approval and allowance, upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or religious profession of the wife, as aforesaid, has all the force of a judicial sentence," — so that this rescript, originally pleaded as tantamount to a separation, and, secondly, to the effect of a sentence of separation, is here stated to have the force of a judicial sentence, — "such rescript being deemed a conditional sentence from the time of its issue, but having its full force and vigor from the moment that the conditions mentioned or referred to in the rescript have been fulfilled." And it goes on to plead, "And so much was and is well known to the judges and advocates presiding or practising in Roman Catholic ecclesiastical courts, and others of reputation for their skill and knowledge of the law as there administered; and is also laid down by divers authors of eminence and authority on that subject." I say nothing as to the mode of pleading the law as applicable to the case; it is certainly something out of the usual course of pleading; but considering this to be the law, at least for present purposes, I am bound to consider this the law by which the Roman Catholic subjects of Rome are governed. Admitting that to be the fact, the question remains to be considered, What is the effect of this law, as applicable to the circumstances of this particular case; that is, of a marriage of American subjects, being Protestants at the time of marriage, and afterwards abjuring that faith, and being admitted members of the Roman Catholic church, and the husband taking orders in that church?

Now, admitting the law to be such as it is here pleaded, the whole question is not determined by that fact, because, in order to make this a law binding in this country, it must be shown that it has been received into this country, and that this country is bound to respect that law of the church in Rome. We all know, that, in questions of marriage contract, the *lex loci contractus* is that which is to determine the *status* of the parties; but we do not know, nor has a case been cited to prove, that those laws, peculiar to a particular state, which are no part of the *jus gentium*, are necessarily taken notice of by other countries. These laws are peculiar to the country in which they are enacted, and are not binding in other countries in which the parties may come to reside. It is not, therefore, sufficient to say that the law of Rome has done so and so; it must be shown that the law of Rome is for this purpose the law of this country; and that is the manner in which this subject of marriage contract has been considered and distinguished in some respects from other contracts. In cases which have come before these courts, the court has adopted, as to the marriage, the *lex loci contractus*, but not adopted the *lex loci contractus* because it is the *lex loci contractus*, but because, the contract having been entered into in a foreign country, the law of England adopts that law as part of its own law. It may be proper

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that the court should refer to some of these authorities, for the purpose of showing the manner in which these contracts have been considered, and as to the extent to which the law of the *lex loci contractus* is to be applied in considering these marriage contracts. Now the first case reported is *Scrimshire v. Scrimshire*, 2 Consis. 395. It was a case which arose before Sir Edward Simpson, in 1752. That was a suit for the restitution of conjugal rights, founded upon a marriage in France, clandestine, and forbidden by the laws of both countries; with this difference, that by the laws of France such marriages are, in all cases, absolutely null; whereas by the laws of England they were only irregular, but not null. There had been a sentence of nullity in France upon the subject of this marriage, and with respect to that sentence Sir Edward Simpson (p. 411) observed, "The suit here is for restitution of conjugal rights, and a sentence in France is not, of itself, a bar to such suit: it is only evidence of what the French law is, by which the court is to try the validity of the marriage or contract. If there had been no sentence in France, the party might have showed that it was not a good marriage by the laws of France; and he might equally have denied the marriage, whether there had been proceedings and sentence or not at Paris; as I take it to be clear that both parties in the cause had obtained a *forum* in France, where the marriage contract was entered into, and by marrying there had subjected themselves to be punished by the laws of the country for a clandestine marriage, and had also subjected the validity of the contract to be tried by the laws of that country; as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage or not, according to the laws of that country, which is still more strongly shown in this case, by inserting the words, 'if holy church shall it admit.'" He went on again: "As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage, and as their mutual intention must be presumed to be, that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, *ad aliud examen*, to be tried by different laws than those of the place where the parties contracted. They may change the *forum*, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such." Then he goes on to state some of the authorities, Sanchez and others, to which it is not necessary now to refer. In another part he makes these observations, p. 416: "Why may not this court, then, take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books, the practice of nations, and the mischief and confusion that would arise to the subjects of every country from a contrary doctrine, I may infer that it is the consent

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of all nations, that it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule where one party is domiciled and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this court, observing that law in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *jus gentium* is part." And that is the rule, and the effect of the observations made by Lord Stowell in *Dalrymple v. Dalrymple*, where he says, the law of England has adopted the law of *lex loci contractus* as a part of its own law, and we are to be governed by that law in determining the *status* constituted by contract in a foreign country. Sir Edward Simpson says, "All nations allow marriage contracts; they are *juris gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations with respect to legitimacy, successions, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries; that is, the law where the contract is made." So that upon this point, followed by the other cases, *Harford v. Morris*, and *Dalrymple v. Dalrymple*, in order to ascertain what the *status* of the parties is, you must have recourse to the law of the country where the contract is entered into. The question upon this part of the subject is well stated by Mr. Burge, in his very useful work on the Colonial Laws. Discussing the question of the *status* of parties, after a number of cases and several authorities to which he refers, he concludes in this way, summing up his statements, (vol. 1, p. 681 :) "The *lex loci contractus* is and ought to be invoked only for the purpose of ascertaining whether that which is represented to be a marriage is so in law; or, in other words, whether the relation or *status* of husband and wife has been legally constituted. When that purpose is answered, and it has been ascertained, that, according to that law, a valid marriage has been contracted, as the connection of the parties with the country in which that law exists, and consequently their subjection to that law, ceases, so the law itself ceases to be the rule or authority which governs their conduct, or regulates their rights and obligations. The contract or consent on which the *status* of husband and wife is founded should be considered as perfectly distinct from the *status* itself. The latter is *juris gentium*, and its relations extend so far beyond the parties themselves, that, unlike a contract, it is not in their power to prescribe for themselves the rights which it shall confer or the obligations which it shall impose on them. It cannot,

like an ordinary contract," he says, "be dissolved by their mutual consent. Although incurable insanity or any other impediment should intervene, rendering the one party incompetent to perform his part of the contract, and therefore defeating the end and object of the marriage, still the *status* will subsist." It is not suggested, in this case, that the marriage contract is dissolved, but is only suspended during the continuance of the parties in the state in which they have placed themselves. But, again, upon the question of the dissolution of this contract by the mutual consent of the parties, he says, (and he is citing from Huber,) "*Solvitur matrimonium partium consensu nullo modo, quia non, ut reliqui contractus merè consensuales, status prior conjugum potest reintegrari.*" Not by the consent of the parties alone can the marriage be dissolved, because it differs from those other contracts, which are merely agreements which the parties themselves may put an end to, if they think proper, and then they are restored to their former state and condition; but in the case of matrimonial contracts, "*nullo modo, quia non, ut reliqui contractus merè consensuales, status prior conjugum potest reintegrari.*"

Now we come to the other point: "The municipal law of every country takes upon itself to define and declare the rights, duties, and obligations which shall be incident to the *status* of marriage, whether that *status* has been originally constituted under its own law, or under that of any other country. It would be deprived of its legitimate power, if persons, by importing the regulations prescribed by the law of some other country for their exclusive government, could withdraw themselves from those which the municipal law of the country in which they reside had prescribed for all its inhabitants. It is not, therefore, to the law by which the *status* is originally constituted, but to the law which, after it has been constituted, defines its rights, conditions, duties, and obligations, that resort must be had in ascertaining what these conditions, rights, duties, and obligations are." It is not, therefore, to the law of Rome that we are to look for the conditions, the rights, the duties, and the obligations which arise from the *status* which has been constituted by the law of Rome, or rather by the law of the United States of America; but we must look to the law of England for those rights, and duties, and obligations which proceed from the relation, which is that of husband and wife; and unless it can be shown that the law peculiar to foreign countries, the law peculiar to Rome, or which has been adopted by other countries where the Roman Catholic religion prevails — unless it can be shown that this law has been imported to this country, and become part of the law of this country, we must look to the law of this country for the purpose of ascertaining what are the duties, and responsibilities, and liabilities, and consequences which arise from the married state contracted.

Now, I have had no cases cited to me in which the law of Rome, with respect to this part of the case, has been adopted here; nay, even in this country, when the Roman Catholic religion prevailed here, it is quite clear that the foreign professions were not regarded in this country at all. It was stated in the argument by one of the

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learned counsel — properly stated, too — that the foreign professions were not regarded here when the Roman Catholic religion was the religion of this country. I was referred to Co. Litt. 131, a. That high authority, speaking of persons who are forbidden to sue, who by law are incapacitated from suing, says, "The fifth is, where a man is entered and professed in religion. If such a one sue an action, the tenant or defendant may show that such a one is entered into religion in such a place, into the order of St. Benet, and is there a monk professed, or into the orders of friars, minors, or preachers, and is there a brother professed, (and so of other orders of religion, &c.,) and ask judgment, if he shall be answered. And the cause is this: that when a man entereth into a religion, and is professed, he is dead in the law, and his son or next cousin incontinent shall inherit him, as well as though he were dead indeed." Upon this Lord Coke says, "It is to be observed, that a man doth enter into religion at his first coming, and liveth under obedience, but he is not professed till a year be past, or some time of probation. And he is said to be professed when he hath taken the habit of religion, and vowed three things — obedience, wilful poverty, and perpetual chastity;" and therefore our author saith here, "entered and professed." Therefore I take the law of Rome to be, that a person is not professed until he has taken the habit of religion, and the vow of obedience, wilful poverty, and perpetual chastity: then he is said to be entered and professed. But in 132, b, *note*, we find it stated in this way: "And if one joint tenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in Normandy" — this is the point to which the attention of the court was directed — "or in any other foreign part, such a profession shall not disable them to bring any action in England, because it wanteth trial; but they must be professed in some house of religion within this realm, for that may be tried by the certificate of the ordinary; so as of foreign professions the common law taketh no knowledge." So that in this case of foreign profession, of whatever had taken place at Rome, this country at that time took no notice whatever. Now, in this case, then, what is the law of this country with respect to the rights, the duties, and the obligations which arise out of the contract, of marriage? Why, one of them is undoubtedly the cohabitation of the parties. This is the law of this country universally — a part of the necessary duties and obligations arising out of the marriage contract — the marriage contract which was entered into between the parties. It will not permit the parties voluntarily to separate themselves from each other, and to dispense for themselves with that obligation which is part of the contract into which they have entered. It cannot be by the mutual consent of the parties that this contract can in any manner whatever be released. In the same book to which I have already referred, and which is supported by all the cases which have been determined, Mr. Burge (p. 499) states the matter in these words: "Divorce cannot be effected by the mere private agreement of the parties, but must be awarded by judicial sentence after the party has been duly summoned, and satisfactory proof of the cause

on which it has been sought has been adduced." So that here, according to the general law prevailing in this country, it seems that separation cannot be effected by the mere private agreement of the parties — it must be awarded by a judicial sentence; which is in conformity with the doctrine in *Evans v. Evans*, and a vast number of cases, which it is useless to refer to, because it is the every-day practice in these courts.

Even though deeds should be entered into by mutual consent, a party may, when he thinks proper, recede from that agreement, and call upon the other party to perform the duties and obligations of the marriage contract entered into between them. Now, then, what is the distinction which is made here? Why, that, by the law of Rome, these parties, under the circumstances which are stated in these articles of the allegation, are entitled to live separate and apart from each other. Is this law binding here? I can find no authority, nor have I been referred to authorities, by which this court could be justified in stating that parties coming to this country, and residing here, are not subject to the law of this country, so far as its own matrimonial relations are concerned; so far as its own municipal laws are concerned. Parties cannot come here and say that the law of a country of which they are not natives, and in which they have not been naturalized, but admitted to certain offices, shall set aside those obligations which, according to our law, are the necessary consequence of the marriage contract into which they have entered. That is quite a different consideration from that part of the case which depends on the *lex loci contractus*. Therefore, until it is shown to me that the law of this country recognizes, in its own character, the law of the church of Rome, I am not at liberty to attend to those municipal regulations, and those peculiar regulations, which are only binding upon the subjects of Rome, whether they are resident in the territories of that country, or in those countries where the laws of Rome are respected and treated as a part of the law of the country. Now, something was said, and properly said, upon a sentence of separation; and a sentence of separation pronounced by a competent court is undoubtedly entitled to considerable attention. The law was alluded to by Sir Edward Simpson in *Scrimshire v. Scrimshire*, but more particularly by Lord Stowell in *Sinclair v. Sinclair*, as to the effect of these sentences; and before I look at what is said to be tantamount to a sentence of separation, let us see what Lord Stowell says on that subject in *Sinclair v. Sinclair*, 1 Consis. 296. Lord Stowell says, "Something has been said on the doctrine of law regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries." We admit that the only two grounds of separation in this country are adultery and cruelty. "The validity of marriage, however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country

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where it was solemnized, would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding." That applies to a sentence dissolving a marriage which was entered into by parties in a third country; but the passage to which I meant particularly to refer is this, which follows immediately afterwards: "The only instrument which is produced as a sentence does not contain a word respecting adultery; it speaks singly of nullity; and parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear." So, here; they plead it here as a sentence which is tantamount to, or in effect, a sentence of separation, and is so considered to be at Rome. The sentence itself, therefore, must be looked to, to see what it does import in its own terms. Now, to be sure, to call this a sentence of separation is somewhat beyond, I think, that which the words of the instrument would warrant. It is simply a petition of Mr. Connelly, with the recital of circumstances which I have already adverted to; and it concludes in this way: "In order to accomplish the wishes of your humble petitioner, there remains one favor which he now implores from your holiness. With the acquiescence of the very reverend the superior general of the Society of Jesus, he proposes, before entering that body, to be promoted to the priesthood; and therefore, immediately afterwards, during the present Lent, to take minor orders. It is necessary, however, that your holiness should be pleased to permit the petitioner to be promoted to the aforesaid orders here in Rome, by the hands of his eminence the cardinal vicar, without having recourse to the bishop of Philadelphia for letters dimissory, which would occasion a very long delay, and might, perhaps, give rise to some embarrassment in so delicate an affair." So that, in point of fact, the whole subject of this petition is, under the circumstances which are here stated, to obtain a dispensation with the necessity of obtaining letters dimissory from the bishop of Philadelphia, which might, perhaps, occasion long delay, and give rise to some embarrassment in so delicate an affair. Now, the answer to this petition is in the following words: "Upon audience of his holiness, the 16th March, 1844, his holiness has graciously acceded hereto, and granted to me, the relator, the requisite faculties to this effect, that, without letters dimissory from the right reverend the bishop of Philadelphia, the petitioner may be promoted to holy orders as far as to that of presbyter inclusive, at Rome, for this special reason, that he is considered as no longer having his domicil in the diocese from which he came, not having resided therein since his conversion to the Catholic church. But, as respects the mode and time to be appointed for his ordination, his holiness has considered that it will be proper to confer with the very reverend father, the superior general of the Society of Jesus. Finally, he has ordered that, before the petitioner be promoted to the holy order of sub-deacon, his wife must take the vow of chastity." Then follows the vow of chastity taken by Mrs. Connelly in the month of June, 1845. That is another part of the sentence—part of the

condition upon which is obtained the dispensation with the necessity of obtaining letters dimissory from the bishop of Philadelphia. The vow is a vow of perpetual chastity on the part of Mrs. Connelly, which is stated to be necessary before Mr. Connelly can be admitted to holy orders in the church of Rome. That, in point of fact, is the whole effect of that answer; it is not a sentence of separation—it is not indeed pleaded as a sentence of separation, but as tantamount to, or in effect, a sentence of separation—that is, as I apprehend it to mean, that by one entering holy orders, and the other taking the vow of chastity, they are, according to the law pleaded in the twenty-first article, at liberty to live separate and apart; but it does not entitle them, nor does it pronounce that they are entitled, to live separate and apart from each other in the way in which a sentence of separation is considered in these courts. The consequence of being admitted to holy orders in the church of Rome may produce a separation between the parties, but it is not the effect of that instrument. The court must be governed by the instrument to know what the effect is, and is not to extend it beyond it by parol evidence. I am, therefore, of opinion, on that part of the case, that there is no sentence of separation pronounced by a competent court. Then it comes to be considered, whether the other circumstances connected with this case are such as to entitle the parties to separate themselves from each other in this country, not subject to the law of Rome, not holding the law of Rome to have effect; on the contrary, the rule of these and other courts being, that the municipal laws of one country are not binding on another, except so far as that other country may consent to receive them, and be bound by them. Now, the next question which arises out of the circumstances of this case is, the profession in this country; and, in order to make out that point, recourse has been had to the statute for the relief of his majesty's Roman Catholic subjects; that is, the 10 Geo. 4, c. 7. The title of the act is, "An act for the relief of his majesty's Roman Catholic subjects," passed on the 13th April, 1829. [The court here referred to the 28th, 29th, 30th, 31st, 33d, and 34th sections of the statute, and observed that they did not apply to the circumstances of the present case, and that under the 37th section Mrs. Connelly was exempted, that section enacting, "that nothing herein contained shall extend, or be construed to extend, in any manner to affect any religious order, community, or establishment consisting of females bound by religious or monastic vows."]

Then what does the case come to? Here is a person, admitted to holy orders in the church of Rome, who was at Rome for a temporary purpose, having no fixed domicile there, but so long as his residence in Rome continued he was subject to the law of Rome; but he did not carry this law with him when he left Rome, and the law of Rome would not operate except so far as this country has consented to receive the law, and act on the conditions imposed on these persons, or the immunities granted to them. It was permission to live separate from his wife so long as he lived at Rome; but how could he import that to this country? Would it be an answer to an action for debt for necessities supplied to her, that she was professed

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in religion — that she was the head of a religious community in this country — and she was, therefore, empowered by the law of Rome to live separate from her husband? Are there not other cases which might be supposed in which the husband is answerable for his wife? Take this case: suppose there should be a suit for adultery, would the husband be bound by this foreign separation, by this professing of religion at Rome, to abstain from bringing a suit for separation by reason of adultery? I put it as a case in which it would be impossible to say that the law of Rome would be binding, so as to leave these persons, by the law of this country, to conduct themselves as persons free from those obligations and duties, and not entitled to those rights which flow from the constitution of the relation of husband and wife. Under these circumstances, therefore, I should be of opinion, that, if the allegation was proved as pleaded, it would not form a bar to the suit which is instituted by Mr. Connelly for the restitution of conjugal rights. A good deal was said on the motives by which Mr. Connelly might be supposed to have been actuated to enforce the suit for the restitution of conjugal rights.

Now, I have no means of judging of Mr. Connelly's motives, except from the facts that appear, and which I must take to be true, on this allegation now before the court. The motives may be good or bad. Mr. Connelly undoubtedly consented to the separation — to that which is said to be tantamount to a sentence of separation between himself and his wife; but consent to the separation is no bar to a sentence for the restitution of conjugal rights in this court. I have said that deeds of separation by joint consent are not noticed in these courts; their practice is to pronounce a sentence for the restitution of conjugal rights, notwithstanding deeds of separation are set up and pleaded as a bar. I cannot attend to any argument to be derived from the motives which may be supposed to have influenced Mr. Connelly in his proceedings in this case. But it has been said, that though the court may not consider this as a case in which the circumstances would operate as a bar to the suit, yet the court may hold its hand, considering the situation in which the lady is placed by the vows she has taken, and not compel her to a breach of those vows by enforcing a sentence of restitution. Undoubtedly this circumstance may be material in the feelings of the court, but would form no ground against its judicial sentence. No case has been referred to in which the court has held its hand in cases of this description. The only case in which I remember any thing like that suggested was *Molony v. Molony*, 2 Add. 249. That was a case certainly under very peculiar circumstances; it was a suit for the restitution of conjugal rights promoted by the husband against the wife. The marriage was pleaded in the usual form, the libel was in the usual form, and the allegation of the wife pleaded that the husband had no residence but one in Ireland, and such was her state of health, that it was the opinion of her medical advisers that she could not return to live in Ireland without imminent danger to her health, perhaps to her life. That allegation was admitted by the court with the greatest hesitation, but no further steps were taken in that cause. It might, perhaps, be considered

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to come in some degree within the description of cruelty, that he should compel her to return to a country where her life might be placed in imminent danger from the nature of the climate where she was compelled to reside. But be that as it may, it was with the greatest hesitation that the learned judge then presiding over the Consistory Court admitted the allegation; but nothing further was done in it. There was another case where something of the kind was thrown out under the peculiar circumstances, *Davis v. Scott*, which was considered to be incestuous adultery — the brother with the wife of a brother. In that case it was suggested that there was sufficient ground why the court should not pronounce a sentence of separation, the husband being accessory to his own dishonor; the court was pressed with the necessity of pronouncing a sentence, notwithstanding, because the husband might be compelled to return to the wife, who had been guilty of incest with the brother. Lord Stowell said, the court would consider whether it would or would not decree a separation; but nothing was done with it; there the matter rested; the sentence of separation was not pronounced between husband and wife, because the court was of opinion that the husband was accessory to his own dishonor. These are the only two cases, I think, applicable to the suggestion that the court might hold its hand. In such a case as this, has it any right to withhold from Mr. Connelly the sentence which would entitle him to have his wife return to cohabitation? What the effect of the sentence might be is a consideration into which the court at the present moment will not enter; but being of opinion that the circumstances here pleaded would not be a bar to the sentence prayed; being also of opinion that the court would not be entitled to hold its hand, it is of opinion that the allegation is not entitled to be admitted; therefore it is rejected altogether.

COOPER v. DODD.¹

April 23, 1850.

6 & 7 Will. 4, c. 86 — 3 & 4 Vict. c. 86, s. 24 — Canon 68 —
Pleading.

A clergyman refused to bury the body of a parishioner, on the coroner's order for burial, the jury having returned a verdict of "found drowned," assigning as his reason that such person had died in a state of intoxication, or was *felo de se*. The bishop of the diocese was patron of the preferment, and sent the case, by letters of request, to the Court of Appeal. The citation described the clergyman as vicar of St. Peter's:—

Held, that the mere opinion of the clergyman as to the cause of death did not justify his refusal to bury; that the bishop had, by the 3 & 4 Vict. c. 86, s. 24, the power to send the case up by letters of request; and that the objection as to description should have been raised on protest or in plea.

This was a proceeding, under the 68th canon, by letters of request from the bishop of Ely, promoted by Mr. C. H. Cooper, coroner for

¹ 14 Jur. 724.

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Cambridge, against the Rev. E. Dodd, vicar of St. Peter's, Cambridge, for having refused to bury, in the churchyard of that parish, the corpse of a parishioner, when applied to, after convenient warning given him thereof. The decree issued from this court on the 12th February, 1849, and was personally served; but no appearance being given, on the 2d May the court pronounced Mr. Dodd in contempt for not appearing, and a decree to see proceedings issued, and was personally served; but no appearance being given, in Trinity term articles were brought in, and the court assigned to hear on their admission; whereupon Mr. Dodd appeared in person, under protest, which, when subsequently extended, was to the following effect:—

“London, June 9, 1849.

“Understanding that the official principal of the Court of Arches has pronounced me in contempt for not complying with a primary citation, I, the undersigned, deny his jurisdiction and right to do so. I ask, very respectfully, why am I cited out of my proper diocese, that of Ely? Is it because of letters of request on the part of the bishop? Then on what does the bishop ground his said letters? Is it on the (so called) 68th canon of 1603? Now I protest and declare that the (so called) 68th canon is bad in law and in religion; that the letters of request are bad in law and equity: that the primary citation is also bad in law; and that, consequently, the decree of contempt is null and void; and that all proceedings depending upon it are, and will be, or would be, utterly unlawful and invalid. And I claim for my defence and vindication the laws of the realm, whether secular or otherwise, each and every, and particularly the queen's majesty's ecclesiastical law, as distinguished from the law and practice of the Arches Court. And more particularly I claim the statutes and the canons hereinunder mentioned: 23 Hen. 8, c. 9; 25 Hen. 8, c. 19; 25 Hen. 8, c. 21, s. 1, with 16 Rich. 2, c. 5; canons of 1603 and canons of 1640, (the valid canons for their validity, and the invalid unlawful ones for their intention;) not debarring myself from any available sources of authority and information. The jurisdiction, then, and the exercising of it, being impugned as unlawful, it is submitted respectfully to the official principal for his consideration, whether our laws permit any man to be judge of his own cause, seeing that the decree of contempt must be first pronounced upon before the suit can be proceeded with.

EDWARD DODD, B. D.”

This protest or statement, the relevancy of the matters contained therein being simply denied by the proctor for the promoter, came on for argument.

Mr. Dodd, in person, supported his protest. By the 6th section of stat. 25 Hen. 8, c. 19, the 68th canon, when made, was illegal; it was repugnant to the common law of the church and of the realm. The judge of this court renders himself liable to punishment, under the 94th canon, for citing a party out of his diocese; the judge, therefore, has an interest in this cause. By the 68th canon every person, not denounced *excommunicati majori excommunicatione*, has a right to

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Christian burial; whereas there are many persons not so denounced whom it would be very improper to bury with the words used in the Common Prayer-book; for instance, infidels and blasphemers. The canon, therefore, commands that which is impious and profane. What was bad originally cannot be made good by custom. The canons of 1603 have not the sanction of the church as such. The 139th canon declares that the national synod is that which expresses the voice of the church of England. The 68th canon is not the voice of a synod, and does not express the true voice of the church of England; it was enacted by the provisional synod of Canterbury, but rejected by that of York in the first instance, and no archbishop was present at the synod. The canons of 1603 had the royal assent in the king's parliamentary supremacy only, not his common law supremacy. Under the 12th canon of 1640 the bishop is precluded from sending letters of request; he should have heard the case in person.

Haggard and Bayford, contra. The protest rests on two grounds: first, that this court has no jurisdiction; secondly, that if it has jurisdiction, the judge, through an error, is incompetent to proceed in this case. Neither of these objections is sustainable. The defendant contends that the canons of 1603 do not bind him; that those of 1640 are more binding; but he has adduced no authority; whilst the provisions of 3 & 4 Vict. c. 86, are wide enough on every ground to give the court jurisdiction in this case. *Kemp v. Wickes*, 3 Phillim. 264. *Mastin v. Escott*, 2 Curt. 692. *Titchmarsh v. Chapman*, 1 Robert. 175.

The court overruled the protest, on the grounds that the canons of 1603, although not binding, *proprio vigore*, on the laity, are so on the clergy; that the canons of 1640 (Card. Synod. I. 380, *note*) never had any binding authority in these courts; that, under the 3 & 4 Vict. c. 86, the bishop of Ely had a discretion to hear the matter himself, or to send it to this court; and that, he having exercised that discretion, and the letters of request having been sent and accepted, there could be no doubt that the court was duly in possession of the cause.

Mr. Dodd then appeared absolutely by proctor, and articles were admitted, without opposition, pleading Mr. Dodd's admission in 1844 to the vicarage of St. Giles with St. Peter, Cambridge, the said vicarage comprising two separate benefices, and having separate churches; and that on the 30th and 31st of December, 1848, he was and still continued vicar of the said vicarage and parish church, and as such, and as a priest in holy orders of the church of England, he is obliged to observe the laws, canons, and constitutions ecclesiastical of the realm, the 3 & 4 Vict. c. 86, and the 68th canon; that on the 26th December, 1848, William Hules, a parishioner of the said parish of St. Peter, was found dead therein; that the verdict of the coroner's inquisition declared that he "was found drowned and suffocated in a certain ditch there situate, no marks of violence appearing on his

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body, but how or by what means he became drowned or suffocated, no evidence thereof doth appear to the jurors;" that, pursuant to the act 6 & 7 Will. 4, c. 86, an order for burial was given by the deputy coroner on the 28th, and delivered on the same day to Mr. Dodd, who, after reading the order, returned it, saying, "he should decline to receive it, unless the coroner would send the depositions and the verdict;" and on the following morning he repeated such declaration, adding, "unless the depositions and verdict were supplied to him, he would not allow the body to be taken into the church, nor read the funeral service;" that on the 29th December, Elizabeth Hules, wife of John Hules, son of the deceased, informed Mr. Dodd that he, John Hules, wished his father to be buried on the Sunday following, at two o'clock in the afternoon, in St. Peter's churchyard; and that upon Mr. Dodd telling her that he did not think he could bury him, and upon her inquiring the reason, he stated, "because he died in a state of intoxication;" that on Saturday, the 30th December, the said John Hules informed Mr. Dodd that he wished his father to be buried the next day in the churchyard, and that the grave was ready; that, in the course of the interview with John Hules, Mr. Dodd read to him portions of the burial service, and told him "that he could not read such service over the remains of his father, either at that or any other time, nor bury him, as he died intoxicated;" adding, "Why do you not go to the dissenters? they are not so scrupulous;" that John Hules informed him, "that if he could get a grave dug in the cemetery he would, rather than the body should remain unburied, as it was changing very fast; but that if he could not get a grave there, he should expect the vicar would bury him at the time fixed;" that on the next morning (Sunday, the 31st) John Hules saw Mr. Dodd, at half past eight o'clock, and told him that "he could not get a grave in the cemetery on that day, and that there was no alternative, but that the burial must take place in the churchyard on that day, and that he should expect his father to be buried there according to the forms of the church of England;" adding, "that relatives and other friends had come from a distance, and could not stop beyond it, and that the body was so offensive that the house was scarcely bearable;" that on Sunday, the 31st, both before and after morning service at the church of St. Peter's, notice was given to Mr. Dodd of the desire on the part of the family of the deceased that he should be buried at or about two o'clock in the afternoon, in the grave that day prepared for his remains in the churchyard of the parish of St. Peter, and that Mr. Dodd declared on the occasion of those separate notices, that "he would not bury him;" that the corpse was, at the time intimated, brought to the said church and placed on the bier near the door, which was found to be closed, and it so remained for upwards of an hour, during which John Hules, the son, and other friends of the deceased, remained waiting for the burial of the corpse, and that after the expiration of that period, John Hules and the other friends of the deceased returned with the corpse, which was interred in a cemetery on the following day.

Evidence was taken upon these articles, and at the hearing, —

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Haggard and *Bayford*, for the promoter, submitted that all the necessary facts, including the warning and the refusal, were distinctly proved; and that the excuse alleged, that the party deceased had died in a state of intoxication, was no justification of a refusal to bury the corpse. *Todd's Case*, 3 Notes of Cas. Suppl. 51.

Addams and *R. Phillimore*, for the defendant. The grounds of defence are so many, that there is great difficulty in knowing with which to begin. First, the proceedings have been *coram non judice*. The bishop of the diocese is the patron of the preferment held by Mr. Dodd. The 3 & 4 Vict. c. 86, s. 24, directs, that in such a case the archbishop is to act in his stead; and he might then have pronounced a less sentence than suspension, which this court is compelled to pass under the canon. Secondly, there is no proof that Mr. Dodd is vicar of St. Peter's. Thirdly, the articles do not impute any offence to Mr. Dodd on which a sentence can be founded. The simple refusal to bury is no offence under the canon, which requires convenient warning; and although the heading of the articles alleges, "after convenient warning given you thereof," the antecedent is not "the corpse being brought into the churchyard," but "when duly applied to on that behalf;" and this deficiency is not supplied by the body of the articles. The notice, to be convenient or competent, must have been given by a person competent to give it; and Hules, the son, says he did not give notice. In a criminal plea, charging an offence under a particular statute, the offence should be so laid as to bring it within the statute. The plea should negative all the exceptions, and expressly aver that the party deceased was not *felo de se*, nor excommunicate, nor unbaptized.

SIR H. JENNER FUST, after stating the proceedings in the case. The court has thought it necessary to state these proceedings with some particularity, because the cause, beginning at the commencement of 1849, has been protracted until now; and it appears that the delay has in some measure been increased by the want of appearance on behalf of Mr. Dodd, and by his subsequent appearance under protest. This proceeding is under the 68th canon, which inflicts the penalty of suspension for three months upon a minister who refuses to bury the corpse of a parishioner, which shall be brought into the churchyard, according to the form set forth in the Book of Common Prayer, convenient warning having been given to him before, unless it should appear that the party deceased was under sentence of the greater excommunication for some grievous sin unrepented of. But according to the rubric there are two other cases in which the service is not to be read, where the person is unbaptized, and where he shall have laid violent hands on himself.

The question is, Has Mr. Dodd so conducted himself, in refusing to bury the corpse of this person, as to have incurred the penalty of the canon. It will be proper to consider in the first instance some of the objections taken to the jurisdiction of the court, and the form and substance of the articles. The first objection goes to the very root

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of the whole proceeding. The cause is sent here by letters of request from the bishop of Ely, who is patron of the benefice of which Mr. Dodd is the incumbent, and unless power is given by the act 3 & 4 Vict. c. 86, this court has no jurisdiction to entertain the suit. [The learned judge read the twelve sections of the statute.] These sections refer to proceedings, either before the commission or after the issuing of the commission, at the hearing before the bishop himself. But the 13th section provides, that the bishop may, if he think fit, send the case in the first instance, before a commission of inquiry is issued, or after the commissioners shall have made their report, by letters of request, to the Court of Appeal of the province, to be there heard and determined. There is nothing compulsory upon the bishop: he has the option, and is at perfect liberty, to adopt what course he thinks proper. If the act had stopped here, there could be no doubt of the right of the bishop to take the course he deemed best adapted to the circumstances of the case. But by the 24th section, where the bishop is the patron of the living, he is prohibited from doing any act save that of sending the case, by letters of request, to the Court of Appeal.

It is upon the construction of this section that the court has been called upon to pronounce that it has no jurisdiction in this case. This objection was, in fact, urged by Mr. Dodd personally when his protest was argued, and the court was of opinion that the objection could not be sustained; for the act, by express words, saves to the bishop of the diocese, patron of the living of which the party accused is incumbent, the right of sending letters of request: "That when any act, save sending a case, by letters of request, to the Court of Appeal of the province," thus saving the right of the bishop to that extent, "is to be done, or any authority is to be exercised by a bishop under this act, such act shall be done or authority exercised by the archbishop of the province, where the bishop, who would otherwise do the act or exercise the authority, is the patron of any preferment held by the party accused." If this be not the meaning of the words, "save sending a case, by letters of request, to the Court of Appeal," they have no meaning whatever. I am clearly of opinion, as I was when the protest was argued by Mr. Dodd, that this objection cannot be sustained; that the bishop is at liberty to send the case here by letters of request, although he is patron of the benefice of which the party accused is the incumbent. It is said this is a hardship upon the party; it possibly may be so, but I cannot go out of the words of the act, by which a general power is given to the bishop to send the case here by letters of request. The archbishop, it is said, might, if he had had an opportunity of exercising jurisdiction, have admonished the party, who might have submitted to his authority, and he is deprived of this opportunity by the case being sent at once, by letters of request, to this court. But the bishop is not required to give the archbishop the discretion of proceeding to hear the case, or to send it here by letters of request; it is his own discretion he is to exercise. And even if the case had gone to the archbishop, and proceedings were commenced before him, the archbishop could not,

under the 6th section, without the consent of the party proceeding, inflict any other sentence than that which the law prescribes for the offence imputed to the party.

Another objection taken is to the citation, an objection which was also taken by Mr. Dodd when he argued the question of protest, "that he was not rightly described in the citation, for that St. Peter's is not a vicarage, but a perpetual curacy." No allegation has been given in on behalf of Mr. Dodd, and there is no evidence before the court, as to what the precise nature of the benefice of St. Peter's is. But Mr. Dodd is cited as vicar of the parish church of St. Peter's, he has appeared in that character to the citation, and there is nothing before the court which would show that St. Peter's is not a vicarage. On the contrary, it would seem as if it was a vicarage, so far as the proceedings in this cause go. The instrument of his collation states that it is to "the vicarage of St. Giles with St. Peter's in Cambridge;" and it is proved, that from that time (1844) he was considered as, and he performed the duty of, incumbent of St. Giles and St. Peter's. It is clear that the benefice of which Mr. Dodd is incumbent consists of two parishes, separate and independent, except so far as forming one benefice. They have separate churches, separate burial grounds, and separate officers. I am of opinion, upon this ground, that Mr. Dodd having been inducted as vicar of the parish of St. Peter's, and having appeared to the citation, there being no plea on his part setting forth that the parish was wrongly described, this objection cannot be maintained. Other objections were raised, one of which was, that the articles should have alleged that the party deceased was not excommunicate, that he had been baptized, and that he had not laid violent hands on himself. No case was referred to in this court in which it has been held to be necessary that the articles should contain these averments. Reference was made to proceedings under the Game Law, in which it was necessary that the want of qualification should be specified in the information before the magistrates. But even supposing that the proceedings at common law were to govern this court, there is this material difference, that there is a summary jurisdiction given to the justices to inflict a penalty; and, in order to bring parties within that jurisdiction, it is necessary that the proceedings should show that they were not exempt by possessing a qualification; but, in this instance, there is a general obligation upon the minister of a parish to read the service of the church over the dead body of a parishioner, except in certain cases. To bring a person within the summary jurisdiction of the magistrates, the qualification must be negatived; but it is not necessary to negative the exceptions here; it is for the party proceeded against, if any defence is to be set up on those grounds, to plead and prove the exceptions.

I come next to the consideration of the charges in the articles, and I am of opinion that the offence imputed to Mr. Dodd is sufficiently stated in these articles; and that, if the facts there alleged be established by evidence, the court must hold that Mr. Dodd is brought within and subject to the censure of the 68th canon; and this brings me to the consideration of the evidence. There are some facts

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which are beyond dispute. It is quite clear that Mr. Dodd was the minister of the parish where this person died, and at the time when application was made to him for the burial of the corpse. It is quite clear that the deceased was an inhabitant of the parish, and it is proved that he was a member of the church of England. It is also established that the deceased was found in a ditch, on the morning of the 27th December, suffocated and drowned, without marks of violence on his body; and there was no evidence of the manner in which he came by his death. There is also no doubt that the coroner's certificate was given, whatever may be the effect under the Registration Act, for the burial of the corpse, and that the provisions of the Registration Act had been complied with, and there was no impediment on that ground to the interment of the corpse with the burial service. Wilson, the constable, delivered this certificate, which he had received from the deputy coroner, to Ready, who placed it in the hands of Mr. Dodd on the 28th, the day on which the inquest was held; and Mr. Dodd, according to the statement here, declined to receive the certificate, unless the verdict and depositions were sent to him. But there seems to be some misapprehension on this point, at least, whether more than the verdict was required. However, the deputy coroner, before whom the inquest took place, declined to make any addition to the certificate, inasmuch as it was drawn out pursuant to the directions of the act. It is also proved that the body was not buried on the 31st December in St. Peter's churchyard, but was interred in the cemetery on the following day. The question is, whether Mr. Dodd, having received convenient notice before, did decline or refuse, on the 31st December, to bury the body of this person; and it is upon the evidence of six witnesses that this question must depend. [The court then referred at some length to the evidence, and continued.] The evidence fully establishes, that warning was given to Mr. Dodd, and that he made no objection to the time fixed, but objected to the interment of the body at all, and refused to bury the body, because the deceased had died in a state of intoxication, and had walked into the river, facts of which there is no evidence whatever, beyond the declaration of Mr. Dodd himself, and which do not justify his refusal in the present case. As to the warning or notice, there is no precise form required to be used on such occasions; it is sufficient if intimation be given to the minister before, that is, before the body be brought to the churchyard. I am clearly of opinion, under the circumstances of this case, that the court has no discretion or alternative, but is bound to pronounce a sentence of suspension for three months. The court would have been glad if it had a discretion; but it has been held by this court, and its judgment affirmed by the judicial committee of the privy council, in the case of *Martin v. Escott*, 2 Curt. 692; 4 Moo. P. C. 104, that no other sentence can or ought to be pronounced by this court than that prescribed by the canon. I, therefore, pronounce that Mr. Dodd is brought within the provisions of the canon, and that he be suspended from the ministry for the space of three months; and I also condemn him in the costs of the suit.

Jones v. Nicholay.

Prerogative Court.

JONES v. NICHOLAY.¹

May 11, 1850.

Bill of Exchange — Codicil.

E. N., on his death-bed, gave directions for the writing a paper in the form of a bill of exchange upon his agents, and this paper was signed in the presence of two witnesses, who attested and subscribed the same. The allegation propounding such paper as a codicil was admitted.

THE deceased, a captain in the army, died at Mhow, in Malva, in the East Indies, on the 25th June, 1844, unmarried, without father, brother, or sister, but leaving a mother surviving him. He made a will, dated the 8th of September, 1843, which, on the 9th October, 1845, had been duly proved in the Supreme Court of Judicature at Bombay, together with a paper described as a codicil to such will, by Lieut. Jones, the executor named in the will. After disposing of some legacies, by his will, the deceased appointed his mother, Dame Mary Nicholay, residuary legatee; and in the event of her death in his lifetime, he substituted Lieut. Jones as residuary legatee. The paper so proved as a codicil was in the form of a bill of exchange, as follows:—

"To Messrs. Cox & Co., London.

"Mhow, 24th June, 1844.

"Gentlemen: At twelve days' sight, pay to Messrs. Edmond & Co., of Bombay, on account of Maria Lucretia Jones, the sum of four thousand pounds sterling.

"I remain, gentlemen, your obedient, humble servant,

"£4000.

EDMOND NICHOLAY,

Late Capt. in H. M. 29th Reg't.

"Witnesses, J. G. Scott, Lieut. 22d Reg't, N. I.

W. V. Jones, Lieut. 22d Reg't, N. I."

A caveat against probate of this paper passing under the seal of the Prerogative Court of Canterbury, was entered on behalf of the mother of the deceased, the residuary legatee named in the will, and it was now propounded in an allegation by the executor named in the will, Lieut. Jones. This allegation pleaded the contents of the will, and then went on to state, that at the date of the will the deceased, who had previously quitted the 29th regiment, was engaged to be married to the said Maria Lucretia Jones, then resident with her mother, the widow of a judge, in India; that one or more deed or deeds of settlement, intended to have been executed previous to such intended marriage, had been prepared in England by the testator's directions, and were then sent out to India for execution, the said intended marriage between the deceased and the said Maria

Jones v. Nicholay.

Lucretia Jones being postponed solely for its or their arrival; that such deed or deeds, however, did not arrive in India until after the death of the testator; that the testator had accompanied the family of the said Maria Lucretia Jones to Mhow, and whilst there he was attacked by the illness of which he died; and on the 24th June, 1844, the testator, having been told that his illness was of so serious a nature that he could not hope to live long, and being anxious to provide for his betrothed wife, the said Maria Lucretia Jones, by making a codicil to his will, and to give and bequeath to her the sum of 4000*l.*, then, as he well knew, about to be placed to his credit by his mother, with his agents and bankers, Messrs. Cox & Co., of Craig's Court, Charing Cross, in the city of Westminster, under an arrangement with them to that effect, gave instructions to Lient. Jones to draw up the codicil in question, and which was drawn, at the request and dictation of the testator, in the form of a bill or order on the said Messrs. Cox & Co., for the sum of 4000*l.*, payable to Messrs. Edmond & Co., Bombay; that the said codicil was read over to the deceased, and signed by him at the foot or end thereof, in the presence of two witnesses, who duly attested and subscribed the same. The allegation also pleaded, that, during the interval between the execution of the codicil and the death of the testator, he was perfectly sensible, and expressed his satisfaction at having made the provision contained in the codicil for the said Maria Lucretia Jones; and concluded by pleading that Messrs. Cox & Co. had refused to pay the bill for 4000*l.* to the agents of Miss Maria Lucretia Jones, partly owing to the testator's death between the date of the bill and its being presented, and partly in consequence of notice received by them from the mother of the deceased not to pay it; and that Messrs. Cox & Co. had paid the balance in their hands belonging to the estate of the deceased (4080*l.* 1*s.* 7*d.*) into the hands of the accountant general of the court of chancery, pursuant to an order from that court in a cause there pending, and entitled *Nicholay v. Jones*. The admission of this allegation was opposed.

Harding and Twiss, against the admission of this allegation. This paper does not indicate sufficiently a testamentary intention. It is merely a bill of exchange, payable twelve days after sight, in favor, not of the payee, but of a third party. It is nothing more than a gift, *inter vivos*, and cannot be substantiated in a court of probate.

Addams and Bayford, contra. There can be no doubt that the deceased intended this as a codicil in favor of the lady to whom he was engaged to be married; its form may be peculiar for a testamentary instrument, still its form will not affect its validity. *Ross v. Ever*, 3 Atk. 156. *Glynn v. Oylander*, 2 Hagg. 428. *The King's Proctor v. Daines*, 3 Hagg. 218. *Gladstone v. Tempest*, 2 Curt. 650. If there is a manifest intention that a paper is to operate after death, and it is to be consummated by that event, and it remains uncanceled or unrevoked, it must be treated as testamentary, and is entitled to probate. The facts of this case strongly show that the testator intended this paper to operate as a codicil.

Hay v. Willoughby & Hill.

SIR H. JENNER FURT. I am of opinion that this allegation ought to be admitted to proof. Its object is to establish, as a testamentary paper or codicil to the will of the deceased, a bill of exchange — certainly an unusual form of testamentary instrument; still, if the court should be satisfied that it was the intention of the deceased that it should operate as part of his will, and if the paper was duly executed in conformity with the provisions of the statute, the court would be bound to grant probate of it. Now, looking at the paper, it is certainly not *prima facie* testamentary. The sum for which the bill is drawn is made payable to a trustee; but, on the other hand, it appears to have been signed in the presence of two witnesses, and it remained in the possession of the deceased until his death. It is pleaded that, at the time the paper was written, the deceased was on the point of death, and that he was aware of that fact. From the decided cases bearing on the point, it is clear that the paper would be operative, provided it was the manifest intention of the deceased that its validity was to be consummated by death; such is the principle laid down in the cases cited by the counsel in support of the allegation. The person who would derive the benefit from the paper stood in such a situation towards the deceased, since they were under a matrimonial engagement towards each other, that the bequest in her favor was by no means unreasonable or improbable. I am of opinion that this allegation may be admitted; for if the averments contained in it be proved, this paper will be entitled to probate.

Prerogative Court.

HAY v. WILLOUGHBY & HILL.¹

June 22, 1850.

Administration Bond — Practice.

The court will not direct the bond to be attended with, for the purpose of being sued upon in a court of equity.

IN April, 1848, letters of administration with the will annexed of J. H. were granted to C. H. Willoughby, he, with W. H. Willoughby, since deceased, and W. Hill, as his sureties, having executed the usual bond in the penal sum of 3000*l*. In January, 1849, M. Hay and another, legatees in the will of J. H., filed a bill in chancery against C. H. Willoughby for the due administration of the estate of J. H., and in the proceedings in that suit it was ascertained that C. H. Willoughby had sold out and misapplied a sum of stock, part of the estate of the deceased. A decree afterwards issued from this court, at the promotion of M. Hay, citing the representative of W.

¹ 14 Jur. 750.

Noding v. Alliston.

H. Willoughby and W. Hill to show cause why the said bond should not be permitted to be sued for at common law, *or otherwise*, and attended with, &c.; and on motion the court gave leave for the bond to be attended with, on being sued for at common law.

Addams now moved the court to extend that order, and to direct the bond to be attended with, as well if sued upon in a court of equity as if put in suit in a court of common law.

SIR H. JENNER FUST. Why should I depart from the usual course? Unless you can furnish me with a precedent, I have no disposition to go from the common practice in a matter where the court has a discretion whether the bond shall be attended with at all, or not. Is there not a liability at law?

Addams. I am given to understand that it may be a benefit to the surety to be sued in equity.

SIR H. JENNER FUST. I shall not make a precedent in this case.

Motion rejected.

Prerogative Court.

NODING v. ALLISTON.¹

June 27, 1850.

Will — Witness to — Presence.

Positive evidence of one of the subscribing witnesses negating the fact of signing, or acknowledgment of the signature by the deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the court to pronounce against the due execution of a testamentary paper.

A PAPER was propounded as the will of John Howe, in an allegation upon which the two subscribing witnesses and the writer of the paper were examined. The first subscribing witness deposed, that on his going into the room where the will purported to have been executed, he found the deceased and the two other witnesses; that the writer of the will passed it to the deceased, saying, "Witness," upon which the deceased wrote the word "witness" on the left hand side of the paper; and the writer of the will then pointed to the paper and said, as though speaking to the subscribing witnesses, "Sign," upon which they both signed their names, and left directly; that he had no idea what the paper was, and could not tell by its appearance, for it was folded over, and he saw no writing on it except the word "witness;" and that the deceased did not sign in his pres-

¹ 14 Jur. 904.

Noding v. Alliston.

ence, and he could not have seen him sign unless he had gone right into the room, as the door opened inwards, and the deceased sat behind the door. The other subscribing witness deposed, that he came into the room first, and that the deceased signed his name before him, but whether in the presence of the other subscribing witness he could not tell; and that, after the deceased had so signed his name, it was suggested to him that he should write the word "witness;" whereupon the deceased took and wrote the word "witness," under which the witnesses wrote their names. This witness also deposed, that whilst the deceased was signing his name he saw writing above the signature, but that when the witness signed his own name he saw no writing except that of the word "witness," neither the signature nor any part of the writing being visible, because that half of the paper was turned downwards, and the other half, then turned upwards, was blank, except the word "witness" on it.¹ The third witness, the writer of the paper, deposed, that upon the subscribing witnesses coming into the room, the deceased told them that he wanted them to witness his signature, not saying what the document was; that nothing passed as to the contents or nature of the document in their presence; that the deceased in their presence signed his name at the end of the will, and they put their names to it under the word "witness," which the deceased had written at the deponent's suggestion, and in their presence. He had no doubt they were both present when the deceased wrote his name, but they came in separately, and the thing was done rather in a hurry.

Jenner submitted, upon this evidence, that the will was proved to have been signed in the joint presence of the subscribing witnesses; and he referred at length to the judgment of Knight Bruce, V. C., in *Cooper v. Bockett*, 4 Moo. P. C. C. 434.

Harding, contra. Three questions may be raised: first, Did the testator sign the paper in the presence of the subscribing witnesses? secondly, Did he acknowledge his signature in their presence? thirdly, Did the witnesses see the signature? The evidence answers all these questions in the negative. *Hudson v. Parker*, 1 Robert. 26, shows the necessity of the mental presence of the witnesses; and *Tribe v. Tribe*, 13 Jur. 796, is an authority that mere bodily presence is not sufficient.

Jenner, in reply.

SIR H. JENNER FUST, (after stating the substance of the evidence.) Mere presence of the witness in the room, without any knowledge on his part of what may be going on, is clearly not sufficient to make a good execution; and as the first witness deposes that he never saw the deceased sign his name, and never saw the signature, the court

¹ The paper was folded from top to bottom, the writing and signature being all to the right, and the word "witness" to the left of the fold.

Noding v. Alliston.

cannot hold that the will was executed in the presence of two witnesses present at the same time, and the case falls short of the required proof. No doubt cases may occur, as in *Blake v. Knight*, 3 Curt. 547, where circumstances will lead the court to pronounce against the belief or deposition of the witness; but this is not a case of that kind. I must pronounce against the will; but it is a case where the costs must come out of the estate.¹

¹ In New York, also, it has been held a fatal objection to the proof of a will, if one of the witnesses neither saw the testator subscribe, nor heard him acknowledge, his signature to the instrument. *Rutheford v. Rutheford*, 1 Denio, 33. And so where the testatrix's name had been by another person subscribed to the will before the attesting witnesses were called in, but the testatrix distinctly declared to them both that the paper was her last will and testament; the will was notwithstanding held not to have been duly executed, for the want of its being signed by the testatrix, or having the testatrix's signature acknowledged by her in their presence. *Chaffee v. The Baptist Missionary Convention*, 10 Paige, 85. See *Dewey v. Dewey*, 1 Metcalf, 349. *Adams v. Field*, 21 Vermont, 257. *Hogan v. Grosvenor*, 10 Metcalf, 54.

An attestation made in the same room with the testator is presumed to have been made in his presence, until the contrary is shown, 2 Greenl. Ev. § 678; and it is *prima facie* evidence that the testator did see the witnesses subscribe the will, if he was so situated that he might have seen them subscribe it. *Dewey v. Dewey*, 1 Metcalf, 349. But an attestation not made in the same room is presumed not to have been made in his presence until it is shown to have been otherwise. *Neil v. Neil*, 1 Leigh, 6.

And where the witnesses to a will, after

seeing the testator sign, withdrew into an adjoining room, for the purpose of signing their names more conveniently, but out of the testator's eyesight, as he lay at the moment of signing, this was held in South Carolina not to be a good attestation. *Reynolds v. Reynolds*, 1 Spears, 253.

And so in Massachusetts, where two of the three witnesses to a will, when signing it as such, were in a different room from the testatrix, and not in her presence, view, or hearing, although in a room connected by an intermediate room with that in which she was lying, this was held not to be a sufficient signing by such witnesses in the presence of the testatrix. *Baldry v. Parris*, 2 Cushing, 433.

So a signing by witnesses in the same room where the testator lay sick in bed, with the curtains closed, but totally unable to draw them aside, was held not a signing in his presence, he not being able from his position to see the witnesses. *Tribe v. Tribe*, 1 Rob. 775. 13 Jur. 793. But the bare fact of the curtains being closed might not, under different circumstances, be fatal. *Newton v. Clark*, 2 Curteis, 820.

In *Russell v. Falls*, 3 Har. & McHen. 457, which was very much considered, it was held necessary that the testator should have been able to see the attestation, without leaving his bed. See also *Dee v. Mansfold*, 1 M. & S. 294; 2 Greenl. Ev. § 678.

Hampden v. Hampden.

Consistory Court.

HAMPDEN v. HAMPDEN.¹

July 5, 1850.

Husband and Wife — Abatement of Suit — Costs.

In a suit against the husband, the wife returned to cohabitation after the cause was set down for hearing, but the cause was not dismissed. The proctor portected his bill for costs, and subsequently the wife, on alleged fresh misconduct of the husband, again left him, and instructed her proctor to bring in additional articles pleading such misconduct:—

Held, that the proctor was entitled to have his bill taxed, and the additional articles might be brought in.

THE proctor for the wife, in a case of divorce against the husband by reason of adultery, prayed leave to correct his bill of costs; the proctor for the husband objected, and in act on petition, alleged that on the 4th of February last the cause was concluded and assigned for information and sentence, and papers delivered for the hearing on the 9th of February; that on the 6th the wife voluntarily abandoned her suit and returned to her husband's home, and resumed her cohabitation, whereby the hearing of the cause was prevented; that on and by reason of the return to cohabitation, the separate character of the wife, as a party in the said cause, became extinct, and the suit and proxy therein given by her became and were wholly and entirely abated and abrogated, and the jurisdiction of the court between and over the parties in the cause wholly and entirely ceased; that the citation in the cause was served upon the husband on the 31st of July, 1849, and the marriage confessed on the 29th of November; and that it was in the power of the proctor for the wife, from such time, to have enforced payment of his costs from time to time, and at any time previously to the conclusion of the cause, but that the proctor took no measures for procuring payment of such costs, and did not intend to have such costs taxed, or make any application for payment thereof, until after sentence; that the object of the law in permitting *de die in diem* taxation was to obviate any inconvenience in the progress of the cause from the wife's want of funds, and that, the wife's proctor having forborne at the proper time to procure such taxation, the court would not now assist him, and that his appointment was extinct. In answer to these averments the proctor for the wife alleged that when the cause was about to be heard, the husband forcibly introduced himself into the presence of his wife, and took away from her by force her infant child, and by that means and threats compelled her, against her own inclination, to return to cohabitation, and to instruct her proctor not to let the cause proceed to a hearing, but that the cause was still outstanding, and had never been dismissed; that subsequently to the premises, and on the 25th of May last, the wife was again compelled to leave her husband by

¹ 14 Jur. 750.

In the Goods of Smith.

reason of cruelty and fresh acts of adultery, and that such cruelty and adultery are about to be set up in plea in additional articles to the libel. The reply denied that the wife had been compelled to return to cohabitation, and the acts of violence and adultery, but admitted that she had again left her husband's house.

Curteis, for the husband.

Addams, contra.

DR. LUSHINGTON. I am clearly of opinion that the cause has not abated, and consequently the proctor for the wife is entitled to have his costs taxed, and may bring in the additional articles to his libel.

P r e r o g a t i v e C o u r t .

In the Goods of SMITH.¹

November 7, 1850.

Probate of Will — Foreign Laws.

Deceased, domiciled at the Mauritius, left an unattested will and codicil, which were duly registered in the proper court there. Probate of both papers was allowed to pass, the Wills Act not extending to the Mauritius.

THE deceased, James Smith, Esq., late of Port Louis, in the Island of Mauritius, and assistant colonial secretary there, died on the 14th of July, 1849, having made a will, dated the 10th of October, 1845, with a codicil thereto, bearing date the 10th of May, 1849. He had been many years domiciled in the Mauritius. The will and codicil were both signed by the testator, but there were no subscribing witnesses to either of them; they had been duly registered in the proper court at the Mauritius.

Sir J. Dodson, Q. A., upon affidavits stating the domicile of the deceased, and that the will and codicil had been duly registered, which was equivalent to being proved, in the proper court in the Mauritius, moved the court to decree probate, following, according to the usual course, the grant of the court where the testator was domiciled. The Statute of Wills does not extend to the Mauritius, for it has been held, that no act of Parliament made after a colony is planted is construed to extend to it, without express words showing the intention of the legislature that it should; *Rex v. Vaughan*, 4 Burr. 2500; and so the law of a conquered country prevails until that law is altered by express words. *Burge*, Com. Prel. Treat. 31,

¹ 14 Jur. 1100.

 In the Goods of Wells.

32. The same doctrine is stated in 1 Steph. Com. Introd. sect. 4, p. 100, in these words, that the colonies are not bound by an act of Parliament, unless particularly named. But the authority which is perhaps the most in point is *In the Goods of Foy*, 2 Curt. 328, where probate of the unattested will and codicil of an officer in the East India Company's service, made at the Cape of Good Hope in March, 1838, was allowed to pass here, probate of those papers having been granted at the cape.

SIR H. JENNER FUST. The facts stated show an intention of permanent residence, and satisfy me as to the domicile of the testator. Then does the Statute of Wills apply to the colonies, or are all of them excepted? I should, perhaps, have had some hesitation in deciding that question on motion; but as the affidavits, stating the law of the Mauritius, are made by persons holding high official appointments there, and who must be presumed to be acquainted with the law of that island, I will follow the grant, and allow probate of these papers.

Prerogative Court.

In the Goods of WELLS.¹

March 10, 1851.

Practice — Trust Fund.

S. W. of his will appointed E. W. sole executor and residuary legatee. E. W. proved the will in the Prerogative Court, and administered the whole of the beneficial estate of S. W. E. W. died, leaving the whole of his estate within a local jurisdiction, having made a will, but appointed no executor or residuary legatee, administration with which will annexed was granted by the local authority to the next of kin. Certain stock stood in the name of S. W. as surviving trustee, which was not transferred by E. W. Administration granted to the administrators of E. W. as administrators *de bonis non* with the will annexed of S. W.

THIS case was moved on the 11th February in the present year, when the motion was rejected. See 15 Jur. p. 160, 1 Eng. Rep. 632.

Jenner now renewed the motion. The will of E. W., having been properly proved in a local jurisdiction, cannot be transmitted to this court, and the persons to whom administration with that will annexed was granted cannot by its authority become E. W.'s personal representatives. It is true, the parties interested in the fund might join in nominating some person to take administration to S. W., limited to the fund in question; but that course is inconvenient in many respects, and expensive, the parties interested being numerous, and some of them resident in distant countries.

¹ 15 Jur. 362.

In the Goods of Wells.

[He then referred to several cases, from the year 1840, taken from the registrar's book, in which administration had been granted to the representative of the surviving trustee of a fund, and submitted that such was the course of practice, and more convenient than a grant to the nominee of the parties beneficially entitled to the fund.]

SIR H. JENNER FUST. I shall always be very unwilling to alter the practice which prevails, and, I presume, must have been found convenient, in the office, although I may not see the reason for that practice. I shall therefore make this grant in accordance with what the cases referred to show to be the ordinary practice.

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1. *Deposit.*] A person who agrees to take shares in a projected company, which becomes abortive, and to pay a preliminary deposit on them, is not thereby rendered a contributory even with respect to the deposit. *Capper's Case*, 77.
2. *Void Sale of Shares.*] A shareholder in a joint-stock company sold his shares to a trustee on behalf of the company, taking, pursuant to a resolution of the company,

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a loan note, at a certain rate of interest, at five years' date. A regular certificate of transfer was given, and entry made of the substituted shareholder's name:—
Held, that (in accordance with the decision in *Morgan's Case* of the late lord chancellor) the vender of the shares was still a contributory, without qualification. *Lawes*, ex parte, 106.

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COSTS.

1. *Railway Co.*] The costs of the heir at law of a lunatic, attending the master upon a reference regarding the taking of a portion of the lunatic's land by a railway company, ordered to be paid by the company. *Walker*, in re, 91.
2. *Foreclosure Suit.*] In a foreclosure suit, brought by mortgagees against, amongst other parties, the assignees of a tenant for life who had executed the mortgage deed, the assignees, by their answer, stated, that before and since the filing of the bill they had offered to the plaintiffs to disclaim by deed, and they disclaimed by their answer:—

Held, that the assignees were entitled to their costs. *Lock v. Lomas*, 95.

3. *Upon Appeal Motion.*] The costs of defendants, who succeeded upon appeal motion, were not mentioned in the judgment pronounced upon the motion, but the order delivered out gave costs against the plaintiff:—

Held, that the costs ought not to have been given against the plaintiff; but they were made costs in the cause. *Evans v. Protheroe*, 83.

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DISCOVERY.

1. *Pleading.*] A bill for discovery in aid of a plea, pleaded by the plaintiff in equity to an action by a trustee upon a covenant entered into by the plaintiff in equity for the payment of an annuity to the plaintiff at law, upon trust for one C. N., stated that the deed of covenant was valid on the face of it, but that the consideration for it was a prospective illicit cohabitation subsequently had between the plaintiff and the said C. N., which had been since discontinued, and that discovery of the true consideration was necessary for his defence at law. Demurrer for want of equity by the plaintiff at law overruled, no discovery being sought which could by possibility subject him to pains and penalties. *Benyon v. Nettlefold*, 113.
2. *Demurrer.*] Although, where a bill is for discovery and relief, it may be demurrable, yet, where it is for discovery only, in aid of a defence at law, it will not be demurrable, unless the discovery would infringe upon some known rule. *Ib.*

EVIDENCE.

Unstamped Receipt.] Two issues were directed out of the court of chancery: one, whether E. R. had agreed to sell three tenements, adjoining the river T., to J. R.; the other was whether the purchase money had been paid. At the trial, an inadequately stamped receipt for 21*l.*, from J. R., "being the amount of purchase for three tenements sold by me adjoining the river T.," and signed by E. R., was received in evidence, and the jury found for the plaintiff on both issues. Upon a motion for a new trial on both issues, *Wigram, V. C.*, thought that the document had been properly received in evidence upon the first issue, on the authority of *Maitland*

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v. Ross, 13 Jur. 307, and refused a new trial upon that issue, but granted a new trial on the second :—
Held, by Lord Cottenham, C., directing a new trial on both issues, that the document had been improperly received in evidence upon the first issue, "the fact of payment being one of the means by which the affirmative of that issue might be proved," and not collateral to the issue, as in *Matheson v. Ross*. *Evans v. Protheroe*, 83.

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INJUNCTION.

1. *Breach of—Motion to commit.*] Parties claiming to be equitable mortgagees in possession of certain freehold houses, commenced pulling down the wall of one of them. The party claiming to have the legal estate thereupon filed his bill against the equitable mortgagees, and obtained, *ex parte*, an injunction to restrain them from pulling down, destroying, or damaging the houses or buildings, and from removing or carrying away the bricks or materials thereof, and from doing or committing any waste, injury, or spoil, to, in, or upon the premises, or any part thereof. The plaintiff afterwards put workmen into the houses, who excluded the defendants by shutting the doors and windows. The defendants thereupon obtained an entry by breaking a window in one of the houses, broke the lock of one of the doors, and ejected the plaintiff's workmen :—

Held, that, under the circumstances, no breach of the injunction had been committed. *Loder v. Arnold*, 87.

2. *Costs.*] **Held**, also, that the defendant was entitled to costs, although he had been guilty of personal violence in obtaining possession. *Ib.*

3. *Indictment.*] The agents of the receiver in a cause, acting under leave of the court, took forcible possession of a house occupied by a servant of one of the defendants. An order was made restraining that defendant from prosecuting an indictment against the agents. *Turner v. Turner*, 130.

4. *Application to Parliament.*] The shareholders of the South Devon Railway Company consisted of two classes, viz., the proprietors of whole shares, and the proprietors of half or guaranteed shares, and the directors introduced two bills into Parliament to vary the rights and privileges of the respective classes :—

Held, on motion for an injunction by an owner of whole shares, who alleged that the proposed alteration would be injurious to the owners of whole shares, that, having regard to the public character of the company, the proposed scheme could not be considered as such a breach of trust or duty to the company as would induce the court to restrain the directors from using the name and seal and credit of the company in introducing and prosecuting the bill, they entering into a similar undertaking to that imposed on the defendants in *Parker v. The Dunn Navigation Company*. But an injunction was granted to restrain the application of the funds of the company in prosecuting the bill in Parliament, so far as it proposed to affect the privileges attached to the half shares. And the question as to the payment of the

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costs to be incurred in prosecuting the bill was reserved. *Stevens v. South Devon Railway Co.*, 138.

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See PLEADING, 2.

JOINT STOCK COMPANIES.

Expenses of winding up.] The deed of settlement of the St. George Steam Packet Co. contained a clause for its dissolution in a particular manner, in certain given events. In 1843 the company was dissolved, and a committee was appointed to wind up its affairs. The then existing state of the law rendered it very difficult to proceed effectually. The committee, who had appointed a solicitor, authorized him to incur expenses in order to procure the introduction in a public act of Parliament of clauses which would be applicable to the case of the company. The winding-up act, 1848, was passed, and an order under it was obtained for the winding up of the affairs of this company. The committee claimed before the master to be paid the expenses so incurred out of the assets of the company, but the claim was rejected by him, and, on appeal, his decision was affirmed, the court being of opinion that the expenses were incurred in employment beyond the functions of the committee to order. *Cropper*, ex parte, 72.

See SHAREHOLDER.

JURISDICTION.

Winding-up Order.] The court has jurisdiction, on appeal from the decision of the master disallowing a claim under a winding-up order, to direct an action at law to try the validity of the debt. *Norwich Yarn Co., &c.*, in re, 118.

LIMITATIONS.

See SHAREHOLDERS.

LUNATIC.

See COSTS, 1.

MORTGAGE.

Claim for Foreclosure.] A mortgage had been made for the term of 500 years, containing a covenant by the mortgagor to convey the fee when required. This was a claim for a foreclosure of the equity of redemption, and to have the freehold reversion and inheritance conveyed to the mortgagor. The registrar had refused to file the claim without leave.

Leave given. *Phipps v. Budd*, 137.

NEXT OF KIN.

See PRACTICE, 4.

PARTIES.

See PLEADING, 2. PRACTICE, 4-6.

PARTNERSHIP.

See PLEADING, 1.

Chancery.

PLEADING.

1. *Answer — Insufficiency — Partnership.*] A, B, & C carried on business in partnership as bankers. A died, having made B & D his executors, and S a residuary legatee. D was, after the death of A, admitted a partner in the business. A bill was filed by S against B and D for the administration of the estate of A. It stated that the executors had rendered imperfect accounts, particularly with reference to A's capital in the business at his death; that the business had, since A's death, been carried on with his capital, and that the residuary legatees were entitled to one third of the profits. It contained interrogatories, whether the business had not been carried on with A's capital — what were the profits since the death of A — what was the present capital — and what capital had been drawn out since A's death. C, the other partner, was not a party to the bill: —

Held, that, in a suit so constituted, B and D were not bound to answer the above-mentioned interrogatories. *Simpson v. Chapman*, 30.

2. *Parties — Supplemental Bill.*] After a decree in an interpleader suit, one of the defendants, who was the official assignee in insolvency of another defendant, died, and a supplemental bill was filed by a third defendant alone, making the assignee subsequently appointed the sole defendant: —

Held, that the supplemental suit was properly constituted, and an objection for want of parties overruled. *Lyne v. Pennell*, 34.

3. *Protection from Discovery.*] An allegation, in an answer to a bill against brokers, partners, for an account of dealings in stock, that discovery would expose the defendants to penalties under the stock-jobbing act, is sufficient to protect the defendants from the discovery.

4. *Joint Pleadings.*] The defendants to the same bill were interrogated as to which of them received the several sums of money, and whether the same were paid in cash or checks. They set forth an account of their receipts as joint, and only specified the sums received: —

Held sufficient. *Robinson v. Lamond*, 144.

5. *Answer.*] The answer stated, that an account of all dealings was set forth in the schedules, and stated that the defendants have set forth, to the best of their belief or otherwise, a full account: —

Held sufficient. *Ib.*

6. *Practice.*] Where, previous to November, 1850, exceptions had been allowed by the master, and a further answer was put in, the cause can be set down on the old exceptions before the vice chancellor. *Ib.*

See *Discovery*, 1.

PRACTICE.

1. *Affidavit of Service.*] Decree taken against a defendant on an affidavit of service of the *subpoena* to hear judgment. The affidavit stated service on T., who, according to the belief of the deponent, was the defendant's solicitor: —

Held, that if it should appear on the record that T. was such solicitor, the affidavit would be sufficient. *Marsden v. Blundell*, 33.

2. *Rehearing.*] A decree was made establishing a will against a married woman as the heiress at law of the testator; she and her husband were defendants to the suit, and appeared, by counsel, and consented. Upon a motion, by her next friend, she was allowed to present a petition of rehearing. *Turner v. Turner*, 39.

3. *Creditor's Suit.*] In a creditor's suit, though the plaintiff's debt has been disputed by the defendant and established by the court, the usual decree will be made, and the creditor must prove his debt in the master's office. *Field v. Timus*, 89.

4. *Parties — Next of Kin.*] On a bill filed by some next of kin, on behalf of themselves and all others, the court directed some evidence to be produced to show that the others were inconveniently numerous, before the decree should be drawn up. *Leathart v. Thorne*, 94.

5. *Parties — Supplemental Bill.*] If, after decree in an interpleader suit, it becomes necessary to file a supplemental bill, the original plaintiff is not a necessary party to it. *Lyne v. Pennell*, 34.

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6. *Parties to a Claim against Executors.*] *Watson v. Young*, 96.
7. *Appointment of new Trustees.*] *Thomas's Trust*, 111.
8. *Short Claims.*] *Waldron v. Sloper*, 112.

PRIVILEGED COMMUNICATIONS.

See PRODUCTION OF PAPERS, 2.

PRODUCTION OF PAPERS.

1. *Co-executors — Solicitor.*] A defendant admitted that certain documents were in the possession of himself and W. C. his co-executor, and that others were in the possession of their solicitor, W. C. not being a party to the suit:—
Held, that an order for production could not be made against the defendant on such an admission. *Morrell v. Wootten*, 28.
2. *Privileged Communications.*] H. advanced money to G. on the security of certain property recently purchased by G., D. being solicitor to both parties. H. afterwards filed his bill, alleging that the property was insufficient, and that there had been fraud and collusion between G. and D.:—
Held, that letters which had passed between G. and D. with reference to the purchase and to the mortgage were not privileged. *Hawkins v. Gathercole*, 109.
3. *Foreign Penalties — Agents.*] A foreign king, by his bill, alleged, that a part of his subjects in rebellion, calling themselves a government, seized the royal treasury and revenue, remitted the money to this country, and thereout purchased a ship; and that he had since put down the rebellion, and he claimed the ship and a discovery. Two of the defendants, foreigners, by their answer, stated that the persons alleged to be in rebellion were independent, and that the king was a usurper, and had been defeated by the above-mentioned government; that many thousand persons had contributed money for the purchase, amongst other things, of this ship, and that the funds were remitted by the government above mentioned to the defendants as agents; and that the production of documents might subject them, and the persons whose agents they were, to penalties in a foreign country:—
Held, on motion for production, that the persons whose agents they were could not be represented in this court, or were represented by the plaintiff; that the liability of third parties or of the defendants to penalties, in a foreign country, was no defence against production; and production ordered accordingly:—
Held, also, that the admission by the defendants of their having been in rebellion did not deprive them of their right to decline production. *The King of the Two Sicilies v. Willcox*, 122.

REHEARING.

See PRACTICE, 2.

RESIDUARY ESTATE.

See WILL, 7.

SHAREHOLDERS.

Estate of — Liability.] An original shareholder in a joint-stock banking company died possessed of shares, and his executrix produced the probate of his will, and received the dividends regularly for four years as executrix of the deceased shareholder; but the requisite forms for becoming a member of the company in her own right had not been complied with. By the deed establishing the company it was provided, that each shareholder should be entitled to the profits and subject to the losses in proportion to his shares; and it was covenanted that each shareholder, his heirs, executors, &c., should, in respect of shares remaining part of the assets of the covenanters, observe the covenants and stipulations in respect of such shares so remaining part of his assets. The master struck out the name of the executrix from the list of contributories, upon the ground, that more than three years having expired since the death of the shareholder, his estate was not liable, being of opinion that sect. 13 of stat. 7 Geo. 4, c. 46, applied to contribution between partners, as well as to claims by creditors. *Knight Bruce v. C.*, was of a different

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opinion, and referred it back to the master, with a declaration that, either in her own right, or as executrix of the deceased shareholder, she ought to be on the list of contributories :—

Held, first, that the limitation of three years contained in the 7 Geo. 4, c. 46, s. 13, applied to claims by creditors only, and not to claims for contribution as between the partners *inter se*.

Secondly, that upon the construction of the deed, in the absence of any proof that the executrix had done any thing which could have the effect of constituting her a member in her own right, she ought to be on the list of contributories in her representative character.

Thirdly, that the order of the vice chancellor was right in form as well as in principle. *Goulthwaite, ex parte*, 57.

See CONTRIBUTORY, 2. INJUNCTION, 4.

SHORT CLAIMS.

See PRACTICE, 8.

SOLICITOR.

See PRODUCTION OF PAPERS, 1.

STAMP.

See EVIDENCE, 1.

STATUTES CITED AND EXPOUNDED, &c.

7 Geo. 4, c. 46, s. 13.	Limitations,.....	57
5 & 6 Will 4, c. 76.	Municipal Corporation,.....	132
8 Vict. c. 18, s. 80.	Land Clauses Consolidation Act,.....	91
13 & 14 Vict. c. 60, s. 38.	Trustee Act,.....	111

SUPPLEMENTAL BILL.

See PLEADING, 2. PARTIES, 5.

THELLUSSON ACT.

See WILL, 3.

TRUST.

1. *Construction.*] By a grant of King Edward VI., the college house in Ludlow, and divers estates, were vested in the bailiffs, burgesses, and commonalty (who, under the municipal corporation act, took the name of the mayor, aldermen, and burgesses) of the borough of Ludlow, to continue out of the rents, issues and profits the grammar school in Ludlow, which was to be kept by one master and one usher. In 1838, the court of chancery appointed new trustees of the charity estates, and in 1848 a scheme was settled by the court for the management of the charity, and it provided "that the trustees should have authority, from time to time, upon such grounds as they should in their discretion in the due exercise and execution of the powers and trusts reposed in them deem just, to remove the master, usher, &c., from their or his office." The trustees referred to the powers, and upon inquiry, and after several meetings, they passed a resolution to remove the master from his office, which they confirmed. Upon an application by the master to restrain the trustees from enforcing the resolution :—

Held, that the word "trust" in the scheme superadded to the word "power," was to keep in view that it was a trust, for the execution of which the court was providing. *Willis v. Childe*, 41.

2. *Restriction.*] That the word "trusts," especially when considered with reference to the direction to reserve the statement of the grounds of removal, had the effect of restricting the large meaning, which might otherwise be given to the word "discretion." *Ib.*

3. *Power of Trustees.*] That the regulation did not confer upon the trustees an

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arbitrary power to dismiss the master upon any ground which they might deem just, free from any control of this court. *Ib.*

4. *Power not exclusive.*] That the trustees are not the only and absolute judges of the sufficiency of the grounds of removal. *Ib.*
5. *Injunction.*] That the trustees, not having instituted any inquiry in the presence of the master, which might have afforded him the means of explanation and defence, the court, without determining the right or propriety of the conduct of the trustees, granted an injunction to restrain them from enforcing the resolution of removal. *Ib.*
6. *Advowson — Charity.*] The advowson of the mastership of the Hospital of St. John the Baptist, at Bath, with the chapel of St. Michael thereto annexed, was, previous to the act 5 & 6 Will. 4, c. 76, (the municipal corporation regulation act,) vested in the corporation of Bath, the hospital being exclusively for the benefit of the poor of Bath, and under the government of the master: —
Held, that the advowson was ancillary to the charity, and was held upon a charitable trust within the 71st section, and was not liable to be sold under the 139th section; and it was referred to the master to appoint new trustees under the former section. *St. John's Hospital* in re, 132.
7. *Married Women.*] Gift by will to trustees of 3000*l.*, on trust to pay the interest to the separate use of R., and that the same should remain during her life under the direction of the said trustees, as a provision for her, and the interest of it given to her, on her personal appearance and receipt by any banker. After the death of R., the 3000*l.* was to be rendered back to the testator's estate. R. married: —
Held, that she could alien the life interest. *Ross's Trust*, 148.
8. *Costs.*] The 3000*l.* was paid into court by the trustees, under the trustee relief act. The assignee applied for the dividends: —
Held, that the costs of all parties, except R., should come out of the *corpus*. *Ib.*

TRUSTEES.

1. *New Trustees.*] Petition for the appointment of new trustees and a vesting order under 13 & 14 Vict. c. 60. The trust fund was a sum of stock, and no representation had been taken out to the surviving trustee. The court refused to make the order. *Frost's Trust*, 40.
 2. *New Trustee.*] A new trustee will be appointed by the court without a reference, on proof of his fitness, and on his consent. *Robinson's Trust*, 111.
- See TRUST. PRACTICE, 7.

WILL.

1. *Condition Precedent.*] A testator, by will, directed his executors to pay to A 5000*l.* upon her marriage, with all the accumulations of interest thereon from the time of his death: —
Held, that the marriage of A was a condition precedent to the vesting of the legacy. *Morgan v. Morgan*, 35.
2. *Interest.*] A testator gave a legacy to A, with the accumulations of interest from his death, upon a certain contingency, and gave the income of the residue of his estate to H for life, with remainders over. Some years after the death of the testator, it was ascertained that the contingency never could happen: —
Held, that H was entitled to the interest of the legacy from the death of the testator until that period. *Ib.*
3. *Thellusson Act.*] A testator gave specific legacies of considerable value to the mother of B, and then gave to B a legacy of 5000*l.*, upon her marriage, with the accumulations of interest from his death. More than twenty-one years elapsed after the death of the testator, and B still remained unmarried: —
Held, that the accumulation of interest after the expiration of twenty-one years was prohibited by the Thellusson act, and the case did not come within the exception contained in the 2d section. *Ib.*
4. *Construction — Codicil.*] A testator, possessed only of personalty, by the residuary clause of his will bequeathed the same to his wife for life, and after her decease to his children in certain proportions. Having subsequently acquired real

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estate, he made a codicil, by which he left certain shares to his wife, "on the same terms as I have every thing else, (every thing I possess I leave her:)"—
Held, that the words showed a present intention, and passed the real estate. *Warner v. Warner*, 68.

5. *Illegitimate Children.*] A testator bequeathed a portion of his estate in trust for C. P. W. for life, and after his death, "the interest for the maintenance of C. P. W.'s wife and education of his children; at his wife's death, the principal to be equally divided among his children then living." C. P. W. at the date of the codicil was unmarried, but had illegitimate children, of which fact it was assumed the testator was cognizant:—

Held, that such children were excluded. *Id.*

6. *Perpetual Annuity.*] A testator charged on his freehold house an annuity to E. P. for 50*l.* a year, for her and her three children, and after her decease he directed the money to be paid to each of them as they should attain twenty-one, but if either of them should die, to be paid to the survivor:—

Held, that this was a gift of a perpetual annuity of 50*l.* to E. P. and her children, and the survivor of them, and that they were entitled to have such a sum raised, by sale or mortgage, as would produce 50*l.* per annum. *Potter v. Baker*, 92.

7. *Residuary Estate.*] A testator gave his residuary real and personal estate to trustees, upon trust, after the death of C, as to one fourth, as C should appoint, and upon trust to divide the rest and residue between other persons. Soon after his death, a suit was instituted for the administration of his personal estate, which continued for twenty-five years after his death, when C died without making an appointment:—

Held, that the one fourth went to the heir. *Simmons v. Rudall*, 97.

8. *Limitations.*] The heir was made a party for the first time at the death of C:—

Held, that he was barred by the lapse of time from disputing the validity of the devise to the trustees. *Id.*

9. *Interlineations.*] In the will were erasures and interlineations in the handwriting of the testator:—

Held, in the absence of evidence, that they must be taken to have been made after the execution, and to be void, as related to the real estate. *Id.*

10. *Construction — Family.*] Direction in a will, that the residue, after the death of the tenant for life, should be equally divided among a testator's five sisters and their respective families:—

Held a gift of one fifth to each of the sisters and her children living at the death of the testator as joint tenants. *Parkinson*, in re, 104.

WINDING-UP ACTS.

See JOINT STOCK COMPANIES. JURISDICTION.

Common Law, Admiralty, &c.

☐ In this index, the cases in the Ecclesiastical and Admiralty Courts are denoted by the abbreviations (EC.) and (AD.) All other cases are in the Common Law Courts.

ABATEMENT.

See COLLISION, 2. HUSBAND AND WIFE, 3.

ACCIDENT.

See COLLISION, 1.

ACTION.

Condition precedent.] The plaintiff and defendants entered into an agreement with a railway company to execute a contract, for making a tunnel upon a line of railway, called "the Morley contract." The plaintiff then assigned to the defendants all his right and interest in the contract, and the defendants agreed to pay a given sum to the plaintiff upon the completion of the contract. Subsequently, it became necessary to vary the levels, and the defendants agreed with the company to make the tunnel in a different direction from that specified in the Morley contract, and upon different terms as to payment:—

Held, that the plaintiff had no right to sue the defendants for the sum stipulated to be paid to him by the agreement, as the Morley contract never was completed. *Humphreys v. Jones*, 306.

ACTION ON THE CASE.

See DECEIT, 1.

ADMINISTRATION BOND.

Practice.] The court will not direct the bond to be attended with, for the purpose of being sued upon in a court of equity. *Hay v. Willoughby and Hill*, (EC.) 593.

ADMINISTRATION DE BONIS NON.

Practice — Trust Fund.] S. W. of his will appointed E. W. sole executor and residuary legatee. E. W. proved the will in the Prerogative Court, and administered the whole of the beneficial estate of S. W. E. W. died, leaving the whole of his estate within a local jurisdiction, having made a will, but appointed no executor or residuary legatee, administration with which will annexed was granted by the local authority to the next of kin. Certain stock stood in the name of S. W. as surviving trustee, which was not transferred by E. W. Administration granted to the administrators of E. W. as administrators *de bonis non* with the will annexed of S. W. *In the Goods of Wells*, (EC.) 599.

ADMIRALTY, JURISDICTION OF.

See DERELICT IRON, (AD.) 568.

AFFIDAVIT.

Setting forth Date and Authority.] Where the *jurat* of an affidavit stated, that it "was sworn by A B, at G., in the county of L., in Scotland, the fifth of June, eighteen hundred and fifty years, before me, G. R. T., a commissioner for Scotland for taking affidavits in the Court of Queen's Bench at Westminster," it was held, that the date

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of swearing the affidavit, and the authority of the commissioners to take affidavits for the Court of Queen's Bench, were sufficiently set forth. *Bell v. The Port of London Assurance Company*, 193.

See ARREST, 1, 2.

AGENT.

See MASTER OF SHIP. BOTTOMRY.

AGENCY.

See EVIDENCE.

APPEAL.

1. *From Judge at Chambers.*] The rule respecting appeals from a judge at chambers is, that the court will entertain them in cases where the judge is merely acting as delegate of the court to transact its business: *aliter*, where he is exercising an independent jurisdiction conferred on him by the statute. *Kilkenny Railway Co. v. Fielden*, 388.
2. *Only from a Jury.*] *Quære*, per Maule, J., whether any appeal will lie from the decision of a county court, except in cases in which a jury has been summoned to decide on the facts. *East Anglian Railway Co. v. Lythgoe*, 331.

ARBITRATION AND AWARD.

Appointment of Umpire.] An umpire may be appointed by lot, if the parties to the reference assent to such a mode of election. *Taylor v. Backhouse*, 184.

ARGUMENTATIVENESS.

See PLEADING, 2.

ARREST.

1. *Holding to Bail — Averment of Damages.*] It is not absolutely necessary that the plaintiff's affidavit, in support of the application to the judge to hold the defendant to bail in an action for criminal conversation, should have averred that the plaintiff had sustained damages to the amount of 20*l.*, if the court, on the motion to rescind the order, can see that the judge was justified in holding that the affidavit showed sufficiently that the plaintiff had sustained damage to that amount. *Bullock v. Jenkins*, 195.
2. *Sufficiency of Affidavit.*] The affidavit need not state that the writ of summons has been sued out. It is enough if the judge, at the time of the application for the order, was satisfied that it had issued. *Ib.*
3. *Application for Discharge.*] It is competent for the defendant to apply to the court to be discharged out of custody, although he has already applied for that purpose, but in vain, to the same judge who made the order warranting his arrest. On such a motion to the court, the defendant may use additional affidavits to those used before the judge, and may show as grounds of discharge that the plaintiff has no cause of action, and also that he, the defendant, has no intention of leaving the country. *Ib.*

ARTICLES OF WAR.

1. *Mutiny Act.*] The mutiny act and the articles of war apply only to her majesty's forces. *Wolton v. Gavin*, 153.
2. *Enlistment.*] An enlistment on a Sunday is not void under 29 Car. 2, c. 7. *Ib.*
3. *Attestation of Recruit.*] A recruit received enlisting money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the provisions of the mutiny act: —
Held, that such soldier must be presumed to have been regularly attested. The fact

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that the soldier intended to have taken the recruit to be attested before a justice who had no authority to attest, affords no counter presumption that the recruiting soldier had been himself improperly attested. *Ib.*

4. *Validity of Enlistment.*] The provision in the 55th section of the mutiny act as to the questions to be asked of a recruit before enlisting him, is directory only, and the omission to comply with it will not vitiate the enlistment. *Ib.*
5. *Desertion.*] By sect. 57 of the mutiny act, if any recruit shall receive enlisting money, knowing it to be such, and shall abscond or absent himself from the recruiting party, and shall not voluntarily go before a justice within four days to be discharged, such recruit shall be deemed to be enlisted and a soldier as fully to all intents and purposes as if he had been duly attested, and may be apprehended and punished as a deserter:—
Held, (haslamie Erle, J.,) that a recruit who had not been discharged, and had absented himself more than four days after receiving the enlisting money, might be punished as a deserter, although he had never been attested. *Ib.*
6. *Justification of Imprisonment.*] The 20th article of war provides that no officer commanding a guard shall refuse to receive or keep any prisoner committed to his charge by any officer or non-commissioned officer who shall at the same time deliver an account in writing, signed by himself, of the crime with which the prisoner is charged:—
Held, by Lord Campbell, C. J., Coleridge and Wightman, JJ., (dissentiente Erle, J.,) that a commanding officer receiving a soldier charged with desertion by a non-commissioned officer, who delivered a written signed charge of the crime, is justified under that article in detaining such soldier, although he was not taken before a civil magistrate, and a warrant obtained for his detention. *Ib.*
7. *Military Offences.*] The 20th article of war applies to military offences, including desertion; but by *Erle, J.*, it applies only to those who are soldiers *de facto*, and not to those whose qualification as soldiers is disputed. *Ib.*

ASSAULT.

1. *Conviction under higher Charge.*] Prisoners were indicted for the murder and manslaughter of A., *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal:—
Held, by all the judges, that the judge had rightly so directed the jury
2. By stat. 7 Will. 4, and 1 Vict. c. 85, s. 11, it is enacted, "That on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and where such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years:—"—
Held, by Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erle, Williams, and Talfourd, JJ., that under this provision of the statute, the prisoners could not have been lawfully convicted of assault under the circumstances above named, inasmuch as the assault contemplated by the statute must be such as was a part of the very act and transaction prosecuted, and also conduced to the death. *Regina v. Bird and Wife*, 448.

ASSESSMENT.

See TAX.

ASSIGNEES OF BANKRUPT.

Their right to Bankrupt's Estate.]

See BANKRUPTCY. EXECUTION.

ASSIGNMENT.

See COVENANT.

ASSUMPSIT.

See MORTGAGEE.

ATTORNEY.

Alteration of Name of, on the Roll.] On the application of an attorney to be allowed to substitute the name of J. Heaton D. on the roll of attorneys in the place of J. D., the court directed the master to enter on the roll opposite the name of J. D. a memorandum, that by rule of this court J. D. should be known by the name of J. Heaton D., and that the master should be at liberty to make such indorsement of such alteration of the name on the admission of the applicant. *Dearden in re*, 355.

See EVIDENCE, I. COSTS, 7.

AUTREFOIS ACQUIT.

1. *Evidence.*] To sustain a plea of *autrefois acquit*, it is not sufficient merely to put in the record of the first indictment and acquittal. Some evidence must be given to show that the offences charged in the former and present indictment are the same, and this may be done by showing, by some person present at the former trial, what was the offence actually investigated there; and if that is consistent with the charge in the second indictment, it will be a presumptive case, which must be met by the prosecution by proof that the offence charged in the second indictment was not the same as that charged in the first. *Regina v. Bird and Wife*, 439.

2. Prisoners were indicted for the murder and manslaughter of A, *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal:—

Held, by all the judges, that the judge had rightly so directed the jury.

3. By stat. 7 Will. 4, and 1 Vict. c. 85, s. 11, it is enacted, "That on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and where such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years:—"

Held, by Pollock, C. B., Patteson, Coleridge, Wightman, Cresswell, Erle, Williams, and Talfourd, JJ., that under this provision of the statute, the prisoners could not have been lawfully convicted of assault under the circumstances above named, inasmuch as the assault contemplated by the statute must be such as was a part of the very act and transaction prosecuted, and also conducted to the death.

Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin, B., *dissentientibus*.

4. The prisoners, having been subsequently indicted for those assaults, pleaded *autrefois acquit*, and the judge having directed the jury, upon the trial of this plea, to the effect that if they were satisfied there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the crown:—

Held, by Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, Patteson, and Wightman, JJ., and Martin, B., that such direction was not strictly right, inasmuch as the issue raised by the plea was, whether the prisoners had been before tried for the same offence; but, nevertheless, held by Patteson and Wightman, JJ., that the misdirection was not sufficient to invalidate the verdict:—

Held, by Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin, B., that the conviction was bad also by reason of the misdirection.

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5. Where the prisoners had joined in their plea at the trial, and were represented by council appearing for them jointly, and not separately : —
Held, that according to the practice of the Court of Criminal Appeal, they are not entitled to appear by separate counsel at the hearing of the appeal.
 For affirming the conviction, Pollock, C. B., Patteson, Coleridge, Wightman, Creeswell, Erle, Williams, and Talfourd, JJ.
 For holding the conviction bad, Lord Campbell, C. J., Jervis, C. J., Parke and Alderson, BB., Maule, J., and Martin B. *Regina v. Bird and Wife*, 448.

BAIL.

In Cases of Misdemeanors.] Where a case has been reserved for the court of appeal upon a conviction for an assault with intent to commit a felony, the court will not deem itself bound to admit the prisoner to bail until the decision of the point reserved, even although the offence is only a misdemeanor, and the prisoner was admitted to bail of right previously to the trial. *Regina v. Bird and Wife*, 439.

See ARREST.

BANKRUPTCY.

1. *Concealment of Property — Certificate.*] The certificate of a bankrupt who has concealed any part of his property with intent to defraud his creditors is void by the 38th section of the 5 & 6 Vict. c. 122, even though he voluntarily gives it up before the granting of the certificate. *Courtivron v. Meunier*, 393.
2. *Execution against Bankrupt.*] A bankrupt, whose certificate of conformity is suspended for a given time, cannot be taken in execution after the expiration of that time, on a writ of execution issued during its continuance, under the provisions of the 257th section of the 12 & 13 Vict. c. 106. *Everhard, in re*, 382.
3. *Quere*, whether execution under that section can be enforced against the property of the bankrupt. *Ib.*
4. *Assignees.*] Debt for railway calls. Pleas, *secondly*, that the defendant was not a holder of the shares; and *thirdly*, bankruptcy of the defendant. The defendant, being the holder of shares in a railway company, became bankrupt. No transfer of the shares to the assignees had taken place in the mode pointed out by the Companies Clauses Act, 8 Vict. c. 16; but before the *fiat* a correspondence took place between the official and the trade assignee, in which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares in question, and estimating the amount that would be necessary to work the *fiat* and pay dividends, and he subsequently wrote suggesting the propriety of selling the shares. Afterwards, and after the *fiat*, three calls were made : —
Held, first, that there was no evidence of the assignees' having accepted the shares. *South Staffordshire Railway Co. v. Burnside*, 418.
5. *What Debts not barred.*] *Secondly*, that the debt was not barred by the certificate, as it was not provable under the *fiat* as a debt due *in futuro*, within sect. 51 of the 6 Geo. 4, c. 16, or as a debt due on a contingency within sect. 56. *Ib.*
6. *Priority of Creditors.*] The seizure of a trader's goods under an execution in an action commenced adversely, gives the creditor no priority in case such trader is made bankrupt upon a petition for adjudication filed before the sale of the goods, whether the act of bankruptcy is before or after the seizure. *Hutton v. Cooper*, 423.

See EXECUTION.

BASTARDY, ORDER OF.

See JUSTICE OF THE PEACE, 2, 3.

BENEFICES.

See ECCLESIASTICAL LAW.

BILL OF EXCHANGE.

Condition to.] An instrument directed to C. S., by which defendant requested C. S.,

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"ninety days after sight, or when realized," to pay plaintiff, is not a bill of exchange.
Alexander v. Thomas, 286.

See CODICIL.

BILL OF LADING.

See MASTER OF SHIP.

BILL OF PARTICULARS.

See VERDICT.

BISHOP.

See CLERGYMAN. ECCLESIASTICAL LAW, 3, 5.

BOND.

See BOTTOMRY BOND.

BOTTOMRY BOND.

Taken by Agent.] There are cases in which an agent may take a bottomry bond.

A ship, damaged on leaving New York, returned to that port. M., who had acted as agent for her owner, gave the owner notice of the accident, and of his intention to get the ship ready for sea again as soon as possible. The owner communicated with M., and with the ship's master, but provided no funds for the expenses; there was no evidence that the owner or master had credit at New York. When the ship was ready for sea, the master, not being able to pay for the expenses, advertised for a loan on bottomry; and M.'s offer being the lowest, the bond was given:—
Held, that the bond was valid. *The Oriental*, (AD.) 546.

BURIAL, REFUSAL OF.

See CLERGYMAN.

CASES APPROVED, DENIED, &c.

Blackburn v. Edgley, 1 P. Wms. 600, approved, 1.

White v. Barber, 5 Burr. 2703, denied, 308.

CERTIFICATE OF BANKRUPT.

See BANKRUPTCY, 1, 2.

CERTIORARI

1. *Removal of Cause.*] The power given by the 9 & 10 Vict. c. 95, s. 90, to remove a cause from a county court by *certiorari*, is not taken away by the 13 & 14 Vict. c. 61, s. 16. *Brookman v. Wenham*, 269.

2. *Service of Certiorari.*] Where the writ of *certiorari* was left with one of the clerks at the county court office:—

Held, that this was good service upon the judge. *Ib.*

3. *Seemle*, however, the strictly proper course when there has been no actual personal service, and the cause does not come on for hearing until after the return day, would be to rule the judge to return the writ. *Ib.*

4. *Quashing.*] A writ of *certiorari* was granted by a judge to two defendants to remove a plaint of replevin from a county court on an affidavit stating that the rent exceeded 20*l.*, 9 & 10 Vict. c. 95, s. 121. No previous application had been made to the county court judge. At the trial, the defendants presented the *certiorari*, and one of them offered to make the declaration under the 121st section, stating that the other was unable to make it. They also tendered a bond conditioned to prove in the superior court that the rent was more than 20*l.* The sureties were not approved by the clerk of the court. A rule nisi for an attachment had been granted against the judge for not receiving and returning the *certiorari*. The court refused, on the above grounds, to quash the *certiorari*. *Mungean v. Whealley*, 413.

5. *Practice.*] The judge of the county court is bound before allowing the *certiorari*

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to see that the requirements of the 121st section have been complied with: e. g., that the declaration is made, that the bond is given, and that the names of the sureties are given, and approved by the clerk of the court. *Ib.*

6. *Set aside.*] *Semble*, that a *certiorari* may still issue under 9 & 10 Vict. c. 95, s. 90, to remove a cause from the county court, notwithstanding 13 & 14 Vict. c. 61, s. 16; but,—

Held, that all the material facts relative to the state of the cause should be brought before the judge upon the application for the writ; and therefore, where a *certiorari* had been obtained without the judge having been informed that the cause had already been heard for several days in the county court, the writ was set aside as having been issued improvidently. *Parker v. The Bristol and Exeter Railway Company*, 416.

CHARITABLE TRUST.

See TRUST.

CLERGYMAN.

Refusal to bury.] A clergyman refused to bury the body of a parishioner, on the coroner's order for burial, the jury having returned a verdict of "found drowned," assigning as his reason that such person had died in a state of intoxication, or was *felo de se*. The bishop of the diocese was patron of the preferment, and sent the case, by letters of request, to the Court of Appeal. The citation described the clergyman as vicar of St. Peter's:—

Held, that the mere opinion of the clergyman as to the cause of death did not justify his refusal to bury; that the bishop had, by the 3 & 4 Vict. c. 86, s. 24, the power to send the case up by letters of request; and that the objection as to description should have been raised on protest or in plea. *Cooper v. Dodd*, (sc.) 583.

CODICIL.

Bill of Exchange.] E. N., on his death bed, gave directions for the writing a paper in the form of a bill of exchange upon his agents, and this paper was signed in the presence of two witnesses, who attested and subscribed the same. The allegation propounding such paper as a codicil was admitted. *Jones v. Nicholas*, (sc.) 591.

COLLATERAL PROMISE.

See FRAUDS, STATUTE OF.

COLLISION.

1. *Rate of Sailing — Inevitable Accident.*] There is no fixed rule as to the rate of sailing, which depends upon the locality and other circumstances; but where a ship is sailing at a rapid rate, her master and crew are bound to exercise greater caution:—

Held, that where a steamship was going at the rate of twelve and a half knots an hour, in a dense fog, and seven hundred miles from land, and the evidence showed that she had only the ordinary lookout, that no arrangements were made for reporting orders to the engineers, and that one man only was at the wheel, her owners could not avail themselves of the plea of inevitable accident in a cause of damage. *The Europa*, (ad.) 557.

2. *Sale of Ship — Lis alibi pendens.*] Collision in December, 1848, and a warrant of arrest issued in the same month, but never served, as the ship was removed out of the jurisdiction and taken to Scotland. In January, 1849, an action was entered, and the ship arrested at the suit of the same parties, in Scotland, and released on bail. In August, the ship was found within the jurisdiction of the Court of Admiralty, and arrested under a fresh warrant. Measures were then taken by the plaintiffs to abandon the action in Scotland, &c.; and that action, after opposition on behalf of the owner of the ship proceeded against, was finally dismissed in December. The ship was sold in January, 1849, to her present owner:—

Held, first, that the plaintiffs had a right to abandon the suit in Scotland, and that the plea of *lis alibi pendens* could not be maintained.

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3. *Secondly*, that the change of ownership could not affect the liability of the ship. *The Bold Buccleugh*, (A.D.) 536.
4. *Report of Registrar and Merchants — Evidence of Damage and Repairs.*] In considering objections to the report of the registrar and merchants, in a cause of damage, the court forms its opinion upon the whole of the evidence, whether laid before the registrar and merchants, or brought in subsequently; and will, although inclined to confirm the report, especially in matters within the practical knowledge of the merchants, direct the report to be reformed. *The Alfred*, (A.D.) 541.

COMMITMENT.

Time of Issuing.] A warrant of commitment, under the 9 & 10 Vict. c. 95, s. 105, for non-appearance on a judgment summons, issued six months after the order of commitment, is regular, although by the rules of the county court a warrant is current but for two months. *O'Neill*, ex parte, 330.

COMMON OF TURBARY.

See EVIDENCE, 4.

CONCEALMENT.

See BANKRUPTCY, 1.

COMPENSATION.

See SALVAGE, 2.

CONDITION PRECEDENT.

See ACTION.

CONTINGENT DEBTS.

See BANKRUPTCY, 4.

CONVERSION.

See TROVER.

CONVICTION.

D. and G. were indicted in a single count for jointly receiving stolen goods. It was proved that D. first received some of the goods: evidence was then given that G. afterwards, at a separate time and place, received another portion of them. The jury found both guilty:—

Held, that D. and G. could not properly be both convicted under the count for jointly receiving, on proof of separate acts of receiving; that as the evidence given against D. fully satisfied the allegation of a receiving in the indictment, the evidence of receipt by G. ought not to have been admitted; and that, consequently, the conviction was good as against D., but ought to be reversed as against G. *Regina v. Dovey and Gray*, 532.

CORPORATION.

1. *Trespass.*] Trespass will lie against a corporation. *Eastern Counties Railway Co. v. Broom*, 406.
2. An authority by a corporation to commit a tort need not be under seal. *Ib.*
3. *Ratification of Authority.*] The plaintiff below had been taken into custody by a railway inspector, charged with having no ticket, refusing to pay the fare, intoxication, and assaulting the inspector. At the hearing before the magistrate, the solicitor of the company attended to conduct the proceedings:—
Held, that such attendance was no evidence of ratification by the company, it not appearing that the facts were known to the company. *Ib.*

COSTS.

1. *Foreign Corporation.*] In an action brought in the Court of Exchequer, by a company

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- incorporated for making a railroad in Ireland, the court compelled the plaintiffs to give security for costs, although it was sworn that the company had no property in Ireland, and that the greatest part of the shareholders were permanently resident in England. *Kilkenny Railway Co. v. Fielden*, 388.
2. *Husband and Wife.*] In a suit against the husband, the wife returned to cohabitation after the cause was set down for hearing, but the cause was not dismissed. The proctor corrected his bill for costs, and subsequently the wife, on alleged fresh misconduct of the husband, again left him, and instructed her proctor to bring in additional articles pleading such misconduct:—
Held, that the proctor was entitled to have his bill taxed, and the additional articles might be brought in. *Hampden v. Hampden*, (zc.) 597.
3. *Right of Prosecutor to Costs.*] The guardians of a union preferred an indictment for an assault against the putative father of a child, which was found wandering alone within the union, and was taken by the relieving officer to the union workhouse; the father had applied to the guardians to give up the child to him, and offered to pay the expenses incurred. Defendant removed the indictment by *certiorari*, and was convicted:—
Held, that the guardians were entitled to costs under sec. 3. of stat. 5 & 6 Will. & M. c. 11, as civil officers whom it concerned to prosecute. *Regina v. Kenealey*, 180.
4. *Sufficient Interest.*] In order to entitle a prosecutor to costs under that section, it is sufficient to show that he prosecuted in pursuance of some moral obligation, and was not a mere volunteer. *Ib.*
5. *Debt under 20l.*] A bailiff of a county court, who is sued for taking goods under an execution of that court, is within the exception of the 128th section of the 9 & 10 Vict. c. 95; and the plaintiff in such action, unless he recover more than 20l., or the judge certify, is deprived of costs by sect. 139: and in such case, even though the action were commenced before the 13 & 14 Vict. c. 61, if the master refuse to tax the plaintiff his costs, the court will not interfere. *Man v. Buckerfield*, 186.
6. *Seem*, however, the strictly proper course for the defendant to adopt, in actions commenced before the passing of the 13 & 14 Vict. c. 61, is to apply for leave to enter a suggestion to deprive the plaintiff of costs. *Ib.*
7. *Plaintiff in Forma Pauperis.*] A plaintiff, who applies to the court to compel his attorney to repay him the amount of the costs of the day which he had been forced to pay, as he alleged, by reason of the misconduct of the attorney, is not privileged by reason of his suing in *forma pauperis*, from having to pay the costs of the motion, if the rule is discharged. *Bell v. The Port of London Assurance Co.*, 193.
8. *Costs, Defendant's Right to.*] Where, in a criminal information for a libel, the defendant recovers a verdict and judgment, he is entitled to recover from the prosecutor the costs sustained by reason of the information, under the 6 & 7 Vict. c. 96, s. 8, although the only plea upon the record is not guilty, and the judge at the trial certifies, under the 4 & 5 W. & M. c. 18, s. 2, that there was reasonable cause for exhibiting such information. *Regina v. Latimer*, 226.
- Upon Quo Warranto.*] M., an unqualified person, was elected a town councillor of the borough of B., without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be liable to a fine, he signed the usual declaration. Upon application for a *quo warranto*, he sent in a written resignation to the town clerk, which was accepted:—
Held, that the relator was not entitled to the costs of the application. *Regina v. May*, 284.

COUNTY COURT.

- Proceedings on Appeal.*] The defendant was a clerk to the plaintiffs under an agreement for a salary of 140l. a year, determinable by three months' notice, or on payment of three months' salary. The plaintiffs, discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him, without notice or salary. They subsequently sued him in the county court to recover 30l. which he had received to their use. The defendant admitted the receipt of the 30l., but relied as a defence, by way of a set-off, on a claim for 35l. for three months' salary, for having been

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dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—

Held, that the court above would not review the judgment of the county court judge on a question of fact; or, if the judgment given by him were right, consider whether the reasons he assigned for it were valid in law. *East Anglian Railway Co. v. Lythgoe*, 331.

See COMMITMENT.

COVENANT.

Construction.] In a deed by which A assigned to B for a term of years an exclusive license to use a certain patent, after covenants for payment of certain sums in the nature of royalties, there was the following clause: "That if it shall happen in any year during the continuance of the term that the royalties or sums of money hereinafter covenanted to be paid shall not amount to the sum of 2000*l.* sterling, then B shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A such a sum of money as with the said royalties will amount to 2000*l.* for that year, or if B shall at any time make default in payment of such sum of money aforesaid within the time appointed for payment, then it shall be lawful to and for A, by writing, signed by him and indorsed on the said indenture or duplicate thereof, to declare that the said indenture and the license and power thereby granted shall cease and determine:—

Held, that this was not an absolute covenant by B to pay 2000*l.* a year during the term, but only empowered A to put an end to the grant upon non-payment of that sum. *Tielens v. Hooper*, 352.

CRIMINAL CONVERSATION.

See ARREST.

DAMAGES.

For not levying upon Execution.] Declaration in case against the sheriff alleged, that although defendant could have levied of goods of the execution debtor within his bailiwick the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys, or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c.:—

Held, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized if sold for the best price which the sheriff could have obtained. *Mullett v. Challis*, 260.

See COLLISION, 4. VERDICT.

DATE

See AFFIDAVIT.

DEBT.

See SET-OFF.

DEBT OF ANOTHER.

See FRAUDS.

DECEIT.

Concealment.] Where the intended lessor of a particular house knows that the house is in a ruinous state and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practised upon the lessee. *Keates v. Cadogan*, 318.

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DEMURRER.

See PLEADING, 1, 2.

DESERTION.

See ARTICLES OF WAR.

DEVISE.

See WILL.

DISMISSAL.

See SET-OFF.

DISTRESS.

Breaking and Entering.] A landlord may not break open the door of a stable, though without the curtilage, in order to make a distress. *Brown v. Glenn*, 275.

DUTY.

See LEGACY DUTY.

ECCLESIASTICAL LAW.

1. *Union of Benefices.*] The union of two or more benefices cannot be effected without the assent of the patrons. *Daniel v. Morton*, 265.
2. *Quere*, whether a union of two benefices during the life of the incumbent is valid. *Ib.*
3. *Non-residence — Jurisdiction of Bishop.*] A, being perpetual curate of W. S., a benefice with cure of souls, was subsequently presented, instituted, and inducted to a rectory, C., also with cure of souls; both benefices being in the diocese of N., and fifty miles apart from each other. Concurrently with his presentation and institution to the latter benefice, the bishop of N., by an instrument under his episcopal seal, addressed to A, as perpetual curate of W. S. and rector of C., which recited that good causes had been alleged and allowed, united, annexed, and incorporated the rectory with the perpetual curacy during the incumbency of A, in the latter, and so long as he should be perpetual curate there, and no longer, by the bishop's ordinary authority, provided that A should keep a sufficient curate to instruct and teach the people of the parish in which he should not reside: —
Held, that the legal effect of this instrument was not to create a union of the two benefices in the proper sense of the term, so that residence in the one produced a non-residence in the other of the two benefices; and that the bishop had jurisdiction, under the 1 & 2 Vict. c. 106, to appoint a curate for the parish in which A did not *de facto* reside, and to enforce payment of the stipend assigned to him, under sect. 83 of that act. *Ib.*
4. *Proceedings upon a Sequestration.*] A monition was issued by the bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A had wilfully neglected and refused to pay, and that A and the curate having appeared before him, the bishop heard summarily the said differences, and that the said complaint was duly proved before him, and that he adjudged the same to be true: it then admonished and required A to pay the said arrears. Default being made in payment, a sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend: —
Held, that A could not, after the sequestration issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop. *Ib.*
5. *Sequestration.*] A writ of sequestration issued under the stat. 1 & 2 Vict. c. 106, to compel a clergyman to reside on his benefice, is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him, as it is one step towards the forfeiture of the benefice. The bishop, therefore, ought to give the clergyman an opportunity of being heard before directing the sequestration. *Bonaker v. Evans*, 234.

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6. *Right to be heard.*] If, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside; but if that order be disobeyed, the bishop is not justified in directing a sequestration at once, and the sequestration will be void, unless, before issuing it, he gives the clergyman an opportunity of rebutting the supposed facts, or of offering lawful excuse for his disobedience to the order to reside. *Ib.*
7. *Summons.*] *Semble*, that a summons to show cause should precede the issuing of the monition, as it has a penal character; and that the sequestration should recite the delinquency on account of which it is issued, and also the bishop's adjudication on the same. *Ib.*

ENLISTMENT.

See ARTICLES OF WAR.

ERROR.

See MISDIRECTION.

EVIDENCE.

1. *Examination of Counsel.*] The counsel in a case may be examined, to show from his notes, taken at a former trial, what was the evidence then given. *Regina v. Bird & Wife*, 439.
2. *Evidence of Character.*] In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the defendant, on cross examination, asked a witness, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?" — *Held*, that the question was improper, as it was not confined to rumors existing before the words were spoken by the defendant. *Thompson v. Nye*, 169.
3. *Quere*, however, whether the question could have been allowed if it had been so limited. *Ib.*
4. *Prescription — Presumption as to original Grant.*] Trespass for breaking and entering a close of the plaintiff, and breaking down a wall. Pleas, justifying the alleged trespass under the exercise of a right of common of turbary enjoyed by prescription in, upon, and throughout Gidley Common, whereof the said close in which, &c., was parcel, and from which it had been wrongfully enclosed. Replications traversing the "said common of turbary in, upon, and throughout the said close in which, &c., *modo et forma*." Common of turbary had existed and had been exercised over Gidley Common generally; but with respect to the spot in question, before it was enclosed, the jury found that within living memory it had not been capable of growing turf for fuel, or any thing in the nature of turf: — *Held*, that under the issues raised, the exercise of the right over the common generally was admissible evidence, from which it might have been inferred that the original presumed grant extended to the *locus in quo*, and that the defendants were not tied down to show an actual exercise of the right over the particular spot; but that such inference could not be made, when it appeared in effect that from time immemorial it had been impossible to exercise the right over the *locus in quo*. *Pearson v. Underhill*, 228.
5. *Presumption.*] The secretary of a joint-stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased working. *Elmes v. Ogle*, 379.
6. *Admission of secondary Evidence.*] Where secondary evidence of a document is *prima facie* receivable, the opposite party may interpose with proof of facts, which, if true, would render it inadmissible. *Ib.*
7. In an action against one of the directors of a joint-stock company which had ceased working, for salary due to the plaintiff as its clerk, notice was given to the defendant to produce the minute book of its proceedings, kept by the secretary, which contained, as was said, entries of the occasions on which the defendant had attended the meetings of the company, and also the terms of the resolution under which the

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plaintiff had entered into its employ. The defendant having refused to produce this book:—

Held, first, that secondary evidence of its contents was *prima facie* admissible.

8. *To exclude secondary Evidence.*] *Secondly*, that the defendant might interpose with proof to exclude it, by showing that the book was not in his power or control, and that he had communicated this fact to the plaintiff in sufficient time before the trial to enable him to apply for it elsewhere.

9. *Of Authority.*] *Thirdly*, that the fact of the defendant's having paid the demands of another person against the company, for work done on the order of the secretary, was admissible evidence to show that he had authorized the work in respect of which the plaintiff sued. *Ib.*

10. *Handwriting — Similarity of Spelling.*] For the purpose of proving a document in which a word is spelt in a particular manner, *e. g.*, *Tichborne* for *Tichborne*, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, and in which the word is similarly spelt, are admissible in evidence. *Brookes v. Tichborne*, 374.

See COLLISION. TRUST. NEGLIGENCE. AUTREFOIS ACQUIT. MURDER. CORPORATION.

EXECUTION.

Levy on a Bankrupt's Estate.] An execution issued upon a judge's order is an execution obtained "by confession" within the 6 Geo. 4, c. 16, s. 108. Therefore, where a debtor's goods were seized under an execution issued upon a judge's order, and an act of bankruptcy was afterwards committed by the debtor, and a *fiat* issued before the sale, the assignees of the bankrupt were held to be entitled to the goods. *Andrews v. Diggs*, 425.

See BANKRUPTCY.

FELO DE SE.

See CLERGYMAN.

FOREIGN CORPORATION.

See COSTS, 1.

FOREIGN LAWS.

See HUSBAND AND WIFE. WILL.

FORGERY.

1. *Selling out forged Document — Variance.*] The indictment charged the prisoner with uttering, knowing the same to be forged, a certain warrant, order, and request for the delivery of goods, in the words and figures following: "Mr. B,—S. Pleas sen by bearer a quantity of basket nails a clasp. E. L."

It was proved that E. L. was a customer of B.'s, and had employed the prisoner in his service; and that the prisoner had delivered to B. a paper, as set forth in the indictment, which was a forgery of E. L.'s handwriting. The prisoner was convicted. On a case reserved, it was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request:—

Held, that there was no variance, as the document being set out *in hæc verba* in the indictment, the description of it therein became immaterial. *Regina v. Williams*, 533.

FRAUDS, STATUTE OF.

Debt of another — Memorandum.] Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for Scott, Brothers, for moneys advanced by the plaintiff to them; that after the judgment recovered, the plaintiff settled with Scott, Brothers, and that there was nothing due upon the judgment for moneys advanced. Replication, that after judgment recovered, an indenture was executed between the plaintiff and Scott, Brothers, whereby, after reciting the judgment and

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various disputed accounts, an agreement was made between the plaintiff and Scott, Brothers, for the settlement of all disputes, by which it was agreed (*inter alia*) that the plaintiff should advance 800*l.* to the Ulster Banking Company, which he had guaranteed to them, and 200*l.* to Scott, Brothers, and that the debt from Scott, Brothers, should be fixed at 1000*l.*, and that the agreement should be without prejudice to the security of the said judgment against the defendant. Averment, that after the making of the said indenture, and before the execution by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised that the said judgment should stand security for the repayment of the said sum of 1000*l.* and interest. Averment of performance by the plaintiff, and that the said sums of 800*l.* and 200*l.* had been advanced, but never repaid. Rejoinder, traversing the promise, *modo et forma*. Issue thereon. To prove this issue, the plaintiff put in the following letter from the defendant and another surety, dated before the execution of the deed by the plaintiff: "We hereby consent to the within deed being executed by and between the parties, without prejudice to the rights and remedies of the plaintiff, &c., under his judgment for 10,000*l.* to recover the sum of 1000*l.*" &c. This letter had been annexed to the deed, and was intended to have been sent therewith to the defendant for signature; but the letter alone was sent, and the defendant signed it without seeing the deed. *Seem*, that this was not a promise to pay the debt of another within the statute of frauds; but that if it were, there was a sufficient memorandum in writing, as the letter signed by the defendant incorporated so much of the deed as formed the consideration of his promise; and,—
Held, that the issue was rightly found for the plaintiff. *Macrory v. Scott*, 368.

GRANT.

See EVIDENCE, 4.

HANDWRITING.

See EVIDENCE, 10.

HIGHWAY.

1. *Order of Justices*.] An order of justices under sect. 58 of stat. 8 & 9 Vict. c. 20, directing a railway company to repair damage done by them to a road in the course of making the railway, need not specify the particulars of the damage, nor what repairs were to be done; it is sufficient if it states the length of the damaged part of the road, and orders the company to make good all damage done. *London & North-western Railway Co. v. Wetherell*, 265.

The order and conviction for disobedience of it may include several highways in the same parish. *Ib.*

2. *Highway Crossing*.] Declaration stated that the railway of defendants crossed a public highway on a level, yet defendants, disregarding their duty and the statutes in that behalf, did not keep gates across the said highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of plaintiff, lawfully being on the highway near to the railway, at the point aforesaid, went and escaped from the highway into and upon the railway, and were, by a locomotive engine and train of carriages of defendants, run over and killed. Plea, that the horses were not lawfully on the highway at the time when, &c. It appeared that the horses, which were grazing in plaintiff's field, had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—

Held, that the road formed by the company was a highway, though the parish might not be bound to repair it. *Finsett v. The York & North Midland R. Co.*, 289.

HUSBAND AND WIFE.

Suit for Restitution.] P. C. and C. A. C., subjects of the United States of America, and members of the Protestant Episcopal church in the United States, were there married, according to the rights and ceremonies of that church. At the time of the marriage, P. C. was a priest in holy orders of the same church. Some years

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afterwards, P. C. and C. A. C. living in Rome, P. C. desiring to take orders in the Roman Catholic church, presented a petition to that effect, and in compliance with the rescript to that petition, C. A. C. took the vow of chastity, and the petition was granted; the rescript authorizing P. C. and C. A. C. to live separate, and being pleaded to be tantamount to a sentence of separation. The petition and rescript were annexed to the allegation as exhibits. After this, P. C. and C. A. C. came to England, where the latter became superioress in a convent, and the former a chaplain to a Roman Catholic peer. In a suit for restitution of conjugal rights, promoted by P. C. :—

Held, first, that the rescript merely authorized P. C. and his wife to live separate, and did not amount to a sentence of separation.

2. *Secondly*, that the *status* of parties, domiciled subjects of, and married in, America, was not so affected by a sentence pronounced at, and founded on a rule of law peculiar to, Rome, the persons being then resident at Rome, and coming subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the married state of such persons. *Connelly v. Connelly*, (Ec.) 570.

3. *Abatement of Suit — Costs.*] In a suit against the husband, the wife returned to cohabitation after the cause was set down for hearing, but the cause was not dismissed. The proctor protracted his bills for costs, and subsequently the wife, on alleged fresh misconduct of the husband, again left him, and instructed her proctor to bring in additional articles pleading such misconduct :—

Held, that the proctor was entitled to have the bill taxed, and the additional articles might be brought in. *Hampden v. Hampden*, (Ec.) 597.

IMPRISONMENT.

See ARTICLES OF WAR.

INDICTMENT.

See FORGERY.

JOINT ASSAULT.

See MURDER.

JOINT PLEAS.

See PRACTICE. PLEADING.

JOINT PROMISSORY NOTE.

See PROMISSORY NOTES. PAYMENT.

JOINT RECEPTION OF STOLEN GOODS.

See CONVICTION.

JOINT STOCK COMPANY.

See EVIDENCE, 5.

JUDGMENT BY CONFESSION.

See EXECUTION.

JUDGMENT.

See PLEADING, 4.

JURISDICTION OF COURT OF ADMIRALTY.

See DERELICT IRON, (Ad.) 568.

JUSTICE OF THE PEACE.

1. *Power to convict summarily*—9 Geo. 4, c. 31, s. 27.] E. having laid an information before a justice, complaining that M., after having assaulted, had threatened him,

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and praying that he might be bound over to keep the peace, the case was heard at petty sessions, and an assault was proved. The justices convicted M. of the assault, and also obliged him to find sureties of the peace, notwithstanding the protest of E. against the conviction, and his request that only sureties of the peace should be required from M.:—

Held, that the magistrates had no jurisdiction to convict M. of the assault. *Regina v. The Justices of Tolness*, 272.

2. *Order bad in Part.*] An order of justices, bad in part, may be enforced as to the good part, provided that, on the face of the order, the two parts are clearly separable; and it is not necessary in such a case to quash the bad part of the order before enforcing the residue. *Coley, ex parte*, 282.

3. *Divisibility of Order.*] An order in bastardy directed the putative father to pay for the maintenance of the child from the time of its birth, although, as the application was made after two months had elapsed from the birth, the payment ought to have been directed to commence only from the time of the application:—

Held, that the order was divisible; and that it might be enforced, so as to charge the father from the time of the application. *Ib.*

See LICENSE. PAUPER.

LAND TAKEN BY RAILWAY CO.

See RAILWAY COMPANY, 3.

LANDLORD AND TENANT.

See DECEIT. DISTRESS. MORTGAGEE.

LEASEHOLDS.

See DEVISE.

LEGACY DUTY.

Property administered abroad.] An officer in the queen's army, serving in India, died there intestate, leaving all his property (except a small sum owing to him from the war-office) locally situate in India. The widow took out letters of administration in India, and after paying the debts, &c., invested the residue of the estate in India in her own name, for the benefit of herself and the next of kin. Eighteen months afterwards, she came to England and took out administration, in order to recover the debt from the war-office:—

Held, that she must account for, and pay legacy duty on the whole of the property in India. *Attorney General v. Napier*, 397.

LICENSE.

1. *Time of keeping Beer-house open.*] The stat. 3 & 4 Vict. c. 61, s. 15, prohibits the keeping open of retail beer-houses after eleven o'clock at night, within any city, cinque port, town corporate, parish, or place, the population of which, according to the last census, does not exceed 2500, or after ten o'clock elsewhere, (except in London, &c.) H. was situate in three different townships; it had no peculiar local rights, nor did it maintain its own poor, but its population, although not returned in the census, was admitted to exceed 2500. One of the townships, C., had a population of less than 2500. A license was granted for a beer-house, described therein as being in H., in the township of C., and by the license the house was to be closed at ten o'clock:—

Held, upon a rule calling on magistrates to adjudicate upon an information for keeping this house open until eleven o'clock, contrary to the above statute, that it might be kept open until that hour. *Regina v. The Justices of the West Riding of Yorkshire*, 296.

2. *Number of Inhabitants.*] The limitation of time for keeping a beer-house open is fixed with reference to the density of population, and the collection of inhabitants of the requisite number is the governing fact in the application of the statute. *Ib.*

3. *Quere*, if the information had been for infringing the license instead of the provisions of the statute. *Ib.*

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MAINTENANCE.

See PAUPER, 4.

MANDAMUS.

See PARISH.

MARRIAGE.

See HUSBAND AND WIFE, 1, 2.

MASTER OF SHIP.

Authority of Master to sign Bill of Lading.] The master of a ship has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board. *Grant v. Norway*, 337.

MASTER AND SERVANT.

See EVIDENCE, 5.

MEMORANDUM.

See FRAUDS, STATUTE OF.

MERGER.

Higher Security—Pleading.] To the sum of 3000*l.*, parcel, &c., of an *indebitatus* count in debt, the defendant pleaded a subsequent agreement to deliver to the plaintiffs an indenture of covenant to pay the said sum of 3000*l.* on a certain day, and that the defendant, in pursuance of such agreement, did, with the consent and at the request of the plaintiffs, execute and deliver to the plaintiffs such indenture, and did thereby covenant to pay the said sum of 3000*l.* Replication, that the said indenture was made by way of security for the payment of the said debt of 3000*l.*, and that it was always expressed by the said indenture that it was made as such security:—

Held, that the plea was a good plea of merger as to so much of the debt to which it was pleaded, and that the replication was no answer to it. *Price v. Moulton*, 304.

MISCONDUCT.

See SALVAGE, 1.

MISDIRECTION.

The declaration stated that the defendants sold to the plaintiff a cargo of corn then shipped at Orfano on board the O., at a certain price, including freight to Cork, Liverpool, or London; that it was agreed that the quality should be of a certain average, and that the corn had been shipped on board in good and merchantable condition. Breach, that it was not shipped in good and merchantable condition for the performance of the said voyage:—

Held, that it was a misdirection to ask the jury whether the corn was good and merchantable for a foreign voyage. *Dickson v. Zizania*, 314.

MORTGAGEE.

1. *Right to maintain Trespass.*] C. having mortgaged a piece of land to the plaintiff, the defendants, a railway company, afterwards occupied it by laying their rails upon it, and being subsequently called upon by the plaintiff for compensation, negotiated with him in respect thereof. The plaintiff had never been in possession of the land, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. The judge directed the jury that the plaintiff was in a condition to waive the trespass, in respect of the occupation of the land by the railway company, and to bring an action for use and occupation:—

Held, first, that there was evidence for the jury of the defendants' having held the land on the terms of paying for it. Secondly, that the plaintiff, being a mortgagee out of

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possession, and not having entered upon the land previously to the trespass, nor having a judgment by default, or a verdict, in ejectment, in his favor, was not entitled to maintain an action of trespass against the defendants. *Turner v. Camerons, Coalbrook, &c. Co.*, 342.

2. *Waiver of Trespass.*] *Quere.* Supposing the plaintiff to have been in possession of the land, and the defendants to have trespassed thereon and occupied it to his exclusion for some time, whether he would be entitled to recover for use and occupation on the principle that he might waive the trespass and recover in *assumpsit*. *Id.*

MURDER.

1. *Evidence — Joint Assault.*] Prisoners were indicted for the murder of their servant girl by, *inter alia*, a series of beatings.

The evidence proved a series of beatings within the time charged in the indictment, but it was distinctly proved by the surgeon, that these beatings did not produce or even conduce to her death. The cause of death was proved to be by two blows upon the head; but there was no evidence to show how or by whom they were inflicted, or by which of the prisoners, or by both of them:—

Held, that in the absence of any such proof, there was no case for the jury of murder by the said blows in the head, and an acquittal was directed. *Regina v. Bird and Wife*, 428.

2. *Evidence — Murder and Manslaughter.*] Prisoners were indicted for the murder and manslaughter of A, *inter alia*, by a series of beatings and assaults. At the trial, certain assaults were put in evidence, and relied upon by the crown as being the cause of death. But the surgeon who made a *post mortem* examination being of opinion that the death was occasioned, not by the assaults so proved and relied upon, but by a blow upon the head, of the cause of which there was no evidence whatever, the judge directed the jury that the prisoners were entitled to an acquittal:—

Held, by all the judges, that the judge had rightly so directed the jury. *Regina v. Bird and Wife*, 448.

MUTINY ACT.

See ARTICLES OF WAR.

NEGLIGENCE.

1. *Proof of.*] A declaration against a railway company alleged that the plaintiff, at the request of the defendants, became a passenger for hire in one of their trains, for reasonable reward to the defendants in that behalf; and that in consequence of the carelessness, negligence, and want of skill of the defendants and their servants, the train ran against another train on the line, whereby the plaintiff was injured. The defendants pleaded the general issue, with the traverse of the plaintiff being a passenger, &c. At the trial it appeared that the train in question was hired of the company by a society for an excursion, the tickets for which were sold and distributed by the secretary of the latter body, from whom the plaintiff purchased his, and that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line:—

Held, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants; and,—

2. *Secondly*, that there was evidence to go to the jury in support of the allegation that the plaintiff became a passenger for hire with the company. *Skinner v. The London, &c., Railway Co.*, 360.

NEW TRIAL.

New Trial, Time of moving for.] Where a party has obtained a rule *nisi* for a new trial by leave of the court, after the expiration of the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the court will not permit the rule to be made absolute, if the objection is raised on showing cause. *Doe d. Whitty v. Carr*, 167.

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Quare, whether an application to set aside the judgment might not have been made promptly. *Ib.*

See PRACTICE.

NOTICE.

See SET-OFF.

NOTICE TO PRODUCE.

See EVIDENCE, 8.

NOTICE OF TRIAL.

See PRACTICE, 6.

"OR" NOT CONSTRUED "AND."

See COVENANT.

PASSENGER.

See NEGLIGENCE, 2. PLEADING, 6.

PARISH.

Township not a Parish.] The township of B. formed part of the parish of W., but it maintained its own poor, and from time immemorial it had chapel-wardens and a chapel, in which divine service and the sacraments of the church had been performed. In 1727, for the first time, a separate burial ground for the township was consecrated, in which the rite of burial had since regularly taken place. The repairs of the chapel had always been defrayed by rates raised within the township; and the vestry books of B. showed that several payments had been made to the church-wardens of W., but it did not appear that they were contributions towards the repair of the parish church. On the 30th of June, 1825, it was resolved by a majority of the vestry of B., duly convened for that purpose, that an offer of 550*l.* from the society for promoting the enlargement of churches and chapels should be accepted, and that the chapel should be enlarged, any deficiency in the expense to be made up by the sale of certain pews, and by rates under the act of Parliament. It was also resolved to petition the commissioners for building new churches, to erect a new church in the township, free of expense to the inhabitants. On the 29th of November, 1827, the then chapel-wardens duly executed a deed, charging the chapel rates of the township with 600*l.* and interest borrowed for the purpose of enlarging and rebuilding the chapel, a part of which had been paid off:—*Held, first*, that B. was not in itself a parish, within the meaning of the 58 Geo. 3, c. 45, s. 59. *Secondly*, that the resolution of the 30th of June did not contain a sufficient consent of the vestry to the borrowing of the 600*l.*, upon the security of the rates, within the same section, and therefore, that a *mandamus* under the 58 Geo. 3, c. 45, to compel the defendants to pay off the arrears of that amount out of the rates, could not be supported. *Regina v. Billston*, 255.

PAUPER.

1. *Notice of Chargeability.*] Where an order for the payment of expenses and maintenance of a pauper lunatic is made, under the 8 & 9 Vict. c. 126, s. 62, upon the parish in which he is adjudged to be settled, no notice of chargeability is required to be sent by the parish obtaining the order; the requirement of a notice of chargeability being a regulation relating to removals, and not to appeals against removals, and therefore not incorporated into the 8 & 9 Vict. c. 126, s. 62. *Regina v. The Inhabitants of Minster*, 172.
2. *Evidence of Chargeability.*] The order of maintenance recited a prior order for the removal of the lunatic to the asylum, and an order adjudging his settlement to be in the appellant parish, and stated that the pauper, from the time of being sent to the asylum to the time of making the order of maintenance, had been maintained at the expense of the appellant parish:—*Held*, that it sufficiently showed that the pauper was chargeable. *Ib.*
3. *Jurisdiction of Justices.*] The certificate upon which a pauper lunatic was re-

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moved to an asylum under the 8 & 9 Vict. c. 126, s. 48, purported to be, and was in fact, given by a surgeon, but it did not follow the form in schedule E, No. 1, to that act, in stating that he was a member of the College of Surgeons, &c., or in giving his place of abode:—

Held, that although the keeper of the asylum might be guilty of a misdemeanor, under sect. 51, for receiving the lunatic without a certificate in the prescribed form, yet the confinement did not thereby become unlawful, and the lunatic being *de facto* confined in the asylum, the jurisdiction of justices to adjudge the settlement under sect. 58, and to make an order for costs under sect. 62, attached. *Id.*

4. *Maintenance — Expenses of.*] The 12 & 13 Vict. c. 103, s. 5, provides, that all the costs, &c., incurred, or thereafter to be incurred, in and about the obtaining any order of justices for the removal and maintenance of a lunatic pauper who shall have been, or shall be removed under any order to any asylum, &c., and who if not a lunatic would have been exempt from removal by reason of the 9 & 10 Vict. c. 66, shall be borne by the common fund of the union comprising the parish where such lunatic was resident when he was so removed to such asylum:—

Held, that these words must be read to include the expenses of maintenance, as well as those of obtaining the order of removal to the asylum, both of which were, under the circumstances specified, to be borne by the union comprising the removing parish. *Overseers of Snailth v. Overseers of Wigton*, 248.

See SETTLEMENT.

PATENT.

See COVENANT.

PAYMENT.

By Promissory Note.] An agreement between the payee and one of several makers of a joint and several promissory note, that the payee shall take another promissory note in satisfaction of the first, with payment of the note taken by the payee on such understanding, amounts to payment by the other makers of the joint and several note. *Thorne v. Smith*, 301.

PLEADING.

1. *Declaration.*] A declaration in case stated that the defendant, knowing that a certain house was in such a ruinous and dangerous state as to be dangerous to enter, occupy, or dwell in, and knowing that the state of the house was unknown to the plaintiff, by agreement in writing demised the said house to the plaintiff, and the plaintiff agreed to take the same at a certain rent, the plaintiff having previously proposed to take the house for the purpose of immediately occupying and dwelling in the same; that the plaintiff commenced dwelling in the house without notice of its state, and so continued to the knowledge of the defendant; and that the defendant neglected his duty in not giving the plaintiff notice that the house was in the said state before entering into the said agreement, and before the plaintiff commenced occupying; that, shortly after the plaintiff commenced occupying, the house fell down; alleging special damage:—

Held, (on demurrer to the plea,) that this declaration was bad, there being nothing to show that the plaintiff was not to put the house into repair before he commenced occupying, and it not being alleged that he was induced by his belief of the soundness of the house to enter into the agreement, or that any misrepresentation was made by the defendant to the plaintiff as to the condition of the house. *Keates v. Cadogan*, 318.

2. *Argumentativeness.*] A plea to a declaration in debt, after setting out a deed, which it alleged to be a deed of arrangement under 12 & 13 Vict. c. 106, between the defendant and his creditors, stated, that the creditors by whom and on whose behalf the same was sealed, were "more than six sevenths, to wit, nine tenths" in number and value of the creditors of the defendant, &c.:—

Held, (on special demurrer for argumentativeness, and for attempting to raise an

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immaterial issue, &c.,) that the plea sufficiently stated the deed to have been signed "by or on behalf of six sevenths of the creditors," within the meaning of sect. 225. *Stewart v. Collins*, 322.

3. *Variance*.] A plea of set-off stated that the plaintiffs authorized one G. W., trading as G. W. & Co., to sell the goods for the price of which the action was brought, as and for the proper goods of him G. W., and that he did so sell them; and that G. W. was indebted to the defendant, &c. The evidence was, that the plaintiffs authorized G. W. to sell the goods as and for the goods of G. W. & Co., which firm consisted of G. W. and L. S.:—

Held, that this was a material variance. *Addington v. Magan*, 327.

4. *Special finding on Record*.] The jury having found the facts as above according to the evidence, and that finding having been indorsed upon the record:—

Held, that the court could not give judgment for the defendant "according to the very right and justice of the case" by section 24, of 3 & 4 Will. 4, c. 42, that power only being given to the court in the case of variances which they shall think immaterial to the merits of the case. *Ib*.

5. *Several Pleas*.] The defendant to an action of trespass *quare clausum fregit*, may still plead together the pleas of not possessed and *liberum tenementum*, notwithstanding the former plea puts in issue the possession, and also the right to the possession of the close in question. *Slocombe v. Lyal*, 376.

6. *Plea of Justification — Material Averment*.] Trespass, for that the defendant "assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded, and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows. Plea, "as to the assaulting, beating, and ill treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made a great noise, disturbance, and affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, as such captain, to preserve peace and order, and prevent the beating and wounding of such person, gently laid his hands upon the plaintiff, which was the trespass complained of:—

Held, first, that the plea would have been good, without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel, whose name was unknown to the defendant. *Secondly*, that such statement did not necessarily contain matter of description, and, consequently, that a failure of proof of that part of the plea was not material. *Thirdly*, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea. *Noden v. Johnson*, 201.

7. *Duty of Sheriff — Selling for under Price*.] Declaration in case against the sheriff alleged, that although defendant could have levied of goods of the execution debtor within his bailiwick the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods the moneys or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c.:—

Held, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of the goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. *Mullett v. Chailie*, 261.

8. *Held*, also, that though the execution debtor had other goods, which the sheriff had not seized or not sold, the proper estimate of the damages was what the goods would have realized if sold for the best price which the sheriff could have obtained. *Ib*.

See MERGER, 1. CLERGYMAN.

POSTHUMOUS CHILD.

See WILL, 1.

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PRACTICE.

1. *New Trial.*] Where a party has obtained a rule *nisi* for a new trial by leave of the court, after the expiration of the first four days of term, but without giving notice within that period to the opposite party of his intention to move, and the opposite party has signed judgment without any notice of the motion, the court will not permit the rule to be made absolute, if the objection is raised on showing cause. *Doe d. Whitty v. Carr*, 167.
- Quarre*, whether an application to set aside the judgment might not have been made promptly. *Ib.*
2. *Affidavit.*] Where the *jurat* of an affidavit stated, that it "was sworn by A B, at G., in the county of L., in Scotland, the fifth of June, eighteen hundred and fifty years, before me, G. R. T., a commissioner for Scotland for taking affidavits in the Court of Queen's Bench at Westminster," it was held, that the date of swearing the affidavit, and the authority of the commissioners to take affidavits for the Court of Queen's Bench, were sufficiently set forth. *Bell v. The Port of London Assurance Co.* 193.
3. *Motion to rescind Orders to hold to Bail.*] On a motion to rescind a judge's order to hold a defendant to bail in an action, the court will not receive affidavits of collateral facts not submitted to the notice of the judge. *Bullock v. Jenkins*, 195.
4. *Auctioneer — Action against, to recover back.*] Where an auctioneer, against whom an action was brought to recover the deposit on a sale by auction of real estate, upon the ground that the vendor's title was defective, applied for an interpleader rule, and it appeared that the vendor had no other property except that of which the title was disputed, the court refused the application, unless the defendant gave security for costs; and refused to allow the defendant his costs of the application out of the deposit. *Deller v. Prickett*, 232.
5. *Separate Counsel.*] Where prisoners had joined in their plea at the trial, and were represented by counsel appearing for them jointly, and not separately?—
Held, that according to the practice of the Court of Criminal Appeal, they are not entitled to appear by separate counsel at the hearing of the appeal. *Regina v. Bird and Wife*, 448.
6. *Notice of Trial.*] A town cause having been made a *remand*, and then postponed by consent to the sittings after Hilary term, 1849, further proceedings were stayed by an injunction obtained by the defendant on the 11th of January, 1849. The injunction was dissolved on the 7th of August, 1850:—
Held, that the plaintiff was not bound to give a fresh notice of trial for the sittings after Michaelmas term. *The Stockton, &c., Railway Co. v. Fox*, 378.

PRESCRIPTION.

See EVIDENCE, 4.

PRESCRIPTIVE RIGHT.

See TRUST.

PRESUMPTIONS.

See EVIDENCE, 4, 5.

PROBATE.

See WILL.

PROMISSORY NOTES.

- Payment.*] A joint and several promissory note had been given by the defendant and K. to the plaintiffs. K. agreed with L. and the plaintiffs that the plaintiffs should take L.'s promissory note in satisfaction of the defendant's liability on his joint and several note. The plaintiffs, having taken L.'s note on that understanding, received payment of it from R., authorized by L. to pay it:—
Held, that in an action on the first note, the above facts might be given in evidence under a plea alleging payment by the defendant. *Thorne v. Smith*, 301.

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PROTESTANT DISSENTER.

. See TAUST.

RAILWAY.

1. *Liability concerning Highway Crossing.*] Declaration stated that the railway of defendants crossed a public highway on a level, yet defendants, disregarding their duty and the statutes in that behalf, did not keep gates across the said highway, at the point where the same is crossed by the railway, constantly closed, by reason whereof two horses of plaintiff, lawfully being on the highway near to the railway, at the point aforesaid, went and escaped from the highway into and upon the railway, and were, by a locomotive engine and train of carriages of defendants, run over and killed. Plea, that the horses were not lawfully on the highway at the time when, &c. It appeared that the horses, which were grazing in plaintiff's field, had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—*Held, first*, that the road formed by the company was a highway, though the parish might not be bound to repair it. *Fawcett v. The York and North Midland Railway Co.*, 289.
2. *Secondly*, that defendants being required by their railway act, and by sect 9 of stat. 5 & 6 Vict. c. 55, to keep the gates at the crossings constantly closed, the horses were, as against defendants, lawfully on the highway, and therefore plaintiff was entitled to recover. *Ib.*
3. *Right to take Land.*] A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the Railways Clauses Act, 8 Vict. c. 20, s. 16, to take compulsorily, within the time for completing the railway and works, any lands situate within the limits of deviation for the purpose of making a branch railway. *Sadd v. The Malden, Wilham, and Baintree Railway Co.*, 410.
4. *Liability of Stockholders.*] *Quare*, whether the provisions of the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16, whereby shareholders in a joint-stock company are rendered liable for its debts, apply to cases where the company is plaintiff. *Kilkenny Railway Co. v. Fielden*, 388.
5. *Liability of, for Negligence.*]

See NEGLIGENCE. HIGHWAY, 2. CORPORATION, 1, 2, 3.

RATIFICATION.

See CORPORATION, 3.

RECEIVING STOLEN GOODS.

- Joint Reception.*] D. and G. were indicted in a single count for jointly receiving stolen goods. It was proved that D. first received some of the goods: evidence was then given that G. afterwards, at a separate time and place, received another portion of them. The jury found both guilty:—*Held*, that D. and G. could not properly be both convicted under the count for jointly receiving, on proof of separate acts of receiving; that as the evidence given against D. fully satisfied the allegation of a receiving in the indictment, the evidence of receipt by G. ought not to have been admitted; and that, consequently, the conviction was good as against D., but ought to be reversed as against G. *Regina v. Dovey and Gray*, 532.

RECRUIT.

See ARTICLES OF WAR, 3.

REPLEVIN.

See CERTIORARI.

ROMAN CATHOLIC CHURCH.

See HUSBAND AND WIFE, 1, 2.

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SALARY.

See SET-OFF.

SALE OF SHIP.

See COLLISION, 2, 3.

SALVAGE.

1. *Misconduct — Amount of Compensation to Salvors.*] Where salvors are in possession of a vessel, and their services have been accepted, and they can discharge what they have undertaken with safety to the vessel, and with facility, it is not competent to any other persons to interfere with them. But in a doubtful case the salvors will not be justified in refusing further assistance. *The Glory*, (AD.) 551.
2. *Compensation.*] Where salvors, not employed at the time, prevented further assistance being given, although their services were afterwards accepted, and they salvaged the ship and cargo, the court awarded them 100*l.*, instead of 300*l.*, and allowed them two thirds only of their costs. *Ib.*
3. *Agreement — Tender.*] Where the master of a ship in distress agreed with the salvors to pay them a certain sum for their services, the agreement will be upheld as against the salvors, unless fraud be proved against the master. *The Henry*, (AD.) 564.
4. *Consideration.*] The value of the property salvaged is not the only consideration upon which the agreement should be made or depend. *Ib.*

SAILING, RATE OF.

See COLLISION, 1.

SEAL.

See CORPORATION, 2.

SECONDARY EVIDENCE.

See EVIDENCE, 6, 7, 8.

SEQUESTRATION.

See ECCLESIASTICAL LAW, 4.

SEPARATION.

See HUSBAND AND WIFE, 1, 2.

SERVICE.

See CERTIORARI, 2, 3.

SET-OFF.

Claim for Salary.] The defendant was a clerk to the plaintiffs under an agreement for a salary of 140*l.* a year, determinable by three months' notice, or on payment of three months' salary. The plaintiffs, discovering that the defendant had written letters reflecting on them, and communicating information which he had received in his capacity of clerk, dismissed him, without notice or salary. They subsequently sued him in the county court to recover 30*l.* which he had received to their use. The defendant admitted the receipt of the 30*l.*, but relied as a defence, by way of a set-off, on a claim for 35*l.* for three months' salary, for having been dismissed without notice. The plaintiffs contended that the defendant's conduct justified their dismissing him without notice or salary. The judge ruled that the plaintiffs were not justified in dismissing him without his salary, and allowed the set-off:—

Held, on a case stated, that although there were no sufficient grounds for depriving the defendant of his salary, yet as the dismissal was not a wrongful dismissal, but an event contemplated by the agreement, the three months' salary became, on the dismissal, a debt to the defendant, and was a proper subject of set-off. *East Anglian Railway Co. v. Lythgoe*, 331.

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SETTLEMENT.

1. *Residence — Imprisonment.*] The absence of a person from a parish in which he is residing, in consequence of an imprisonment out of the parish, is not of itself such an interruption of the residence as would prevent his becoming irremovable by five years' residence including the time of the imprisonment, if an intention to return at the expiration of the imprisonment exists throughout it. *Holbeck v. Leeds, &c.*, 245.
2. *Removability.*] Therefore, where a pauper had resided for five years in the respondent parish, and during that time had been imprisoned in an adjoining parish for seven days under a conviction in default of paying a fine, and had afterwards returned to his residence, it was held, that he was irremovable under the 9 & 10 Vict. c. 66, s. 1. *lb.*
3. *Removability of Wife.*] A married woman, whose husband was a Scotchman, and had acquired no settlement in England, had, during the absence of her husband, (who had sailed on a voyage to Calcutta without leaving sufficient means of support for his family,) become chargeable to the parish in which she was residing. The wife had acquired a maiden settlement in England:—
Held, that this was such an absence on the part of the husband as amounted to a desertion of his wife, and that she might, therefore, be removed to the place of her maiden settlement. *Regina v. St. Marylebone*, 252.

SHERIFF.

See DAMAGES. PLEADING, 7, 8.

SHIP MASTER.

See MASTER OF SHIP.

SLANDER.

See EVIDENCE, 2.

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SUNDAY.

An enlistment on Sunday is not void under 29 Car. 2. c. 7. *Wolton v. Gavin*, 153.

SURETY.

Liability of Surety for Grantor of Annuity after Discharge.] A surety for the grantor

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of an annuity who has become insolvent, and has obtained a final order for protection under the 5 & 6 Vict. c. 116, s. 10, is not protected from being sued on the default of the grantor for instalments accruing due subsequently to the filing of the petition, by 7 & 8 Vict. c. 96, s. 25, his liability to pay not being a debt within the meaning of that section. *Thompson v. Whalley*, 190.

TAX.

Assessment of.] Though the assessments of the land tax upon counties are perpetual, the commissioners ought to assess the amount charged upon each land tax division by an equal pound rate, according to the fluctuations in the value of property within the division. *Pym*, ex parte, 278.

TENDER.

See SALVAGE.

TIME.

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TORT.

See CORPORATION.

TRESPASS.

1. Trespass will lie against a corporation. *Eastern Counties Railway Co. v. Broom*, 406.

2. *Justification — Distinct Trespass.*] Trespass for that the defendant "assaulted the plaintiff, and beat, bruised, pushed, dragged, and pulled about, kicked, wounded, and ill treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows." Plea, "as to the assaulting, beating, and ill treating" the plaintiff, a justification by the defendant as captain of a vessel on board of which the plaintiff and others were passengers, and alleging that the plaintiff made a great noise, disturbance, and affray on board the said vessel, and was then fighting with another person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, as such captain, to preserve peace and order, and prevent the beating and wounding of such person, gently laid his hands upon the plaintiff, which was the trespass complained of:—

Held, first, that the plea would have been good, without the statement that the person with whom the plaintiff was fighting was a passenger on board the vessel, whose name was unknown to the defendant. *Secondly*, that such statement did not necessarily contain matter of description, and, consequently, that a failure of proof of that part of the plea was not material. *Thirdly*, that the knocking down and prostrating of the plaintiff was alleged as a distinct trespass, and was not covered by the justification in the plea. *Noden v. Johnson*, 201.

3. *Breaking and Entering.*] A landlord may not break open the door of a stable, though without the curtilage, in order to make a distress. *Brown v. Glenn*, 275.

See TROVER. PLEADING, 6, 7. MORTGAGEE.

TROVER.

1. *Conversion.*] A having lawfully received certain bills of exchange from B, a trader, C came to him, and stating that he was acting on behalf of Messrs. Y. & Co., creditors of B, demanded the bills from A, and upon his refusal, said that B was about to be made a bankrupt, that the bills must be given up, and that if they were not, A would be compelled to give them up by the commissioner, and the expense would cost A 200*l.*, and the commissioner would be very angry. A was at the time ill in bed, and, being greatly alarmed, gave up the bills:—

Held, that this was no conversion by C, as trespass would not have been maintainable for the taking under these circumstances. *Powell v. Hogland*, 362.

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2. *Demand and Refusal.*] It appeared, however, that afterwards, and before C had handed the bills to his principals, he was informed that the plaintiff was entitled to the bills, and possession of them was demanded on behalf of the plaintiff, but, notwithstanding this, he delivered them to Messrs. Y. & Co.:—
Held, that this was a conversion. *Ib.*

TRUST.

1. *Charitable Subscription.*] In 1710 certain members of five Presbyterian congregations in Dublin set on foot a subscription, for the purpose of forming a fund for charitable purposes, which, by a deed of trust, was declared to be for the support of religion in and about Dublin and the south of Ireland, by assisting and supporting the Protestant dissenting interest against unreasonable persecutions; and for the education of youth designed for the ministry among Protestant dissenters, and to be chosen out of these five congregations. The funds subscribed were vested in trustees chosen. At the date of this deed there was no Toleration Act for Ireland. In course of time, Unitarian doctrine sprung up in several of these congregations, and for many years past portions of the income of the fund had been applied to Unitarian purposes, and the majority of the present trustees were Unitarians. Upon an information filed against the trustees:—

Held, affirming the decision of the Lord Chancellor of Ireland,—

First, that the expression "Protestant dissenters" had no such known legal meaning as to prevent the admission of evidence; and that theological works of the period might be admitted in evidence to show the meaning of those words, as understood and used by the authors of the trust.

2. *Secondly*, that Unitarians are not entitled to be considered as objects of the trust.
 3. *Thirdly*, that it was not open to Unitarians claiming under the trust to contend that the trust was originally invalid, by reason of there not having been any Toleration Act at the date of the deed.
 4. *Fourthly*, that long enjoyment of the Unitarians created no right; as time affords no sanction to established breaches of trust.
 5. *Fifthly*, that Trinitarian trustees, who had concurred in the breaches of trust, should be removed, as well as Unitarian trustees. *Drummond v. Attorney General*, 15.

TRUSTEES.

1. *Discretion of Trustees.*] By the provisions of a scheme for the management of King Edward VI.'s grammar school at Ludlow, duly confirmed by the lord chancellor, it was declared "that the trustees should have authority from time to time, upon such grounds as they should at their discretion in the due exercise and execution of the powers and trusts reposed in them deem just from time to time, to remove the master, usher, &c., from his office," subject, however, to certain formalities being observed:—

Held, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed, and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the grounds of his removal. *Doe d. Child v. Willis*, 356.

2. *Appointment of Trustees.*] By an order, the lord chancellor, in whom the power of appointing new trustees was vested, referred it to the master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead or who had left the borough of L., and after his report such further order was to be made as was just. The master reported that he had approved of eight persons as fit and proper persons to be appointed, &c. This report was confirmed, and in the confirmation the trustees of charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private act the property of the trust was vested in the trustees for the time being without any deed of transfer:—

Held, that this was a valid appointment of the eight new trustees by the lord chancellor. *Ib.*

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UMPIRE.

See ARBITRATION AND AWARD.

UNITARIANS.

See TRUST.

USE AND OCCUPATION.

See MORTGAGEE.

VARIANCE.

See PLEADING, 3. FORGERY.

VERDICT.

Debt — Credit — Damages.] In an action of debt the plaintiff, in his particulars, stated, "This action is brought to recover the sum of 1s. damages, for the detention of the debt for which this action is brought, together with the costs of suit; the debt, 86l. 9s., having been paid by the defendant to the plaintiff after action brought." The plaintiff having proved, at the trial, a debt of 69l., the verdict was held to have been properly entered for that sum, debt, and 1s. damages. *Nesbitt v. Page*, 326.

WAIVER.

See MORTGAGEE, 2.

WARRANT.

See COMMITMENT.

WARRANTY.

Construction.] An express warranty will not be extended by implication from other parts of the contract in which it occurs. *Dickson v. Ziziniá*, 314.

See MISDIRECTION.

WILL.

1. *Limitation to a posthumous Child — Construction — Intention.*] A testator, by his will, devised an estate to his wife for life, with remainder in fee to his nephew, with a proviso, that in case the testator's wife should at his decease be pregnant with a child, the devise to the nephew was to cease, and such child was to take the remainder in fee. At the time of making his will the testator had no child, and he was expecting to die; but a child was afterwards born in his lifetime, and the testator made a codicil to his will, devising after-acquired property to such child. The wife was not *enccinte* at the death of the testator: —

Held, that the child born in the testator's lifetime had no estate under the will, and that, as there was no posthumous child, the devise to the nephew took effect. *Doe d. Blackiston v. Haslewood*, 308.

2. *Leaseholds passing under a general Devise.*] A testator, by will, made in 1815, devised "all the rest, residue, and remainder of his personal estate, goods, and chattels whatsoever and wheresoever," subject to the payment of debts and legacies, to his brother M. J. D. to and for his own use and benefit, and appointed him sole executor. He further devised "all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, &c., at or near W., in the county of D., and B., in the county of Y., and all other his real estates in the said counties and elsewhere, and all his estate and interest therein, to R. E. D. Shafto." M. J. D. pre-deceased the testator, who, in 1841, duly made a codicil appointing another executor, and ratifying and confirming his will, and died in 1844. At the time of his making the will and at his death, the testator was possessed both of freeholds and leasehold estates in the county of D.: —

Held, that, as under 1 Vict. c. 26, s. 24, the will must be deemed to have been made in 1844, this was a general devise of the testator's lands within 1 Vict. c. 26, s. 26,

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and that the leaseholds passed by it to R. E. D. Shafto, and that the prior devise of all the personal estate did not show a contrary intention so as to prevent the operation of the enacting part of the 26th section. *Wilson v. Eden*, 345.

3. *Witness to — Presence.*] Positive evidence of one of the subscribing witnesses negating the fact of signing, or acknowledgment of the signature by the deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the court to pronounce against the due execution of a testamentary paper. *Nodding v. Alliston*, (sc.) 594.
 4. *Probate of Will — Foreign Laws.*] Deceased, domiciled at the Mauritius, left an unattested will and codicil, which were duly registered in the proper court there. Probate of both papers was allowed to pass, the Wills Act not extending to the Mauritius. *In the Goods of Smith*, (sc.) 598.
 5. *Estate for Life.*] A testator, in the year 1821, devised his real estates to his illegitimate son, J. B., for life, "and from and after the decease of the said J. B., for and to the first and every other son of the said J. B., lawfully issuing, according to seniority of age and priority of birth, in tail male; and in default of such issue, to the daughter or daughters of the said J. B., to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants; and in default of issue of the said J. B., to and for my own right heirs forever: —
Held, that J. B. took an estate for life only under the will. *Baker v. Tucker*, 1.
 6. Although an old decision, which has been long followed as having settled the law, may be shown to have proceeded upon a wrong view of what the case was, it cannot be disregarded. *Ib.*
 7. *Blackburn v. Edgley*, 1 P. Wms. 600, examined and followed. *Ib.*
 8. *Contingent Remainder.*] Although where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and if it be too remote, this and all subsequent remainders are void; yet if a fee be limited in contingency, and the estate is given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder. *Doe d. Evers v. Challis*, 215.
 9. *Construction of Devise.*] A testator gave real property to his daughter Elizabeth for life, and after her decease to such of her children, if a son or sons, who should live to attain the age of twenty-three years, and if a daughter or daughters who should live to the age of twenty-one years, their respective heirs and assigns, as tenants in common; and in case all the children of his said daughter Elizabeth should die, if a son or sons under the age of twenty-three years, or if a daughter under the age of twenty-one years, or if she had none, then the testator gave the said premises unto his son John and his daughters Sarah and Anne, for their respective lives; and upon the decease of his said son and two last-named daughters, he gave the share of such of them so dying unto his or her children, if a son or sons living to attain the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years, his, her, and their heirs and assigns. And in case of the death of his said son or of either of his said two last-mentioned daughters without leaving a child, if a son that should live to attain the age of twenty-three years, or if a daughter who should live to attain the age of twenty-one years, he gave the part and parts such children or child would be entitled to, as aforesaid, unto the child or children of his said son and two last-mentioned daughters having issue, if a son or sons living to the age of twenty-three years, and if a daughter or daughters living to attain the age of twenty-one years; if two of his said last-named children had such children, to them, his or her heirs and assigns, as taking in equal shares from his or her father or mother, his, her, and their heirs and assigns, and if only one of them, his said son and two last-mentioned daughters should leave issue that lived, if a son or sons to the age of twenty-three years, or if a daughter or daughters to attain the age of twenty-one years, then he gave the whole of such premises unto such issue, if more than one in equal shares, their respective heirs and assigns, and if only one, to such one, his or her heirs and assigns, at the ages aforesaid.
- All the children of the testator named in the will survived him. Elizabeth died, never having had a child; Anne survived Elizabeth, and died never having had a

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child ; Sarah died, leaving seven children, all of whom attained the prescribed ages ; John had two children, who attained the prescribed ages in his lifetime : —

Held, that in the events which happened, the limitation subsequent to the death of Elizabeth without issue took effect by way of contingent remainder, supported by her life estate and vesting immediately on its determination, and that upon the death of Anne without issue, each of the children of John took one twelfth of the property originally devised to Elizabeth : —

Held, also, that the gift over took effect upon the death of Anne without ever having had any issue, equally as upon her having children who did not live to attain the prescribed ages. *Id.*

See CODICIL.

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